(24,359)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1914.

## No. 615.

HENRY LA ROQUE, APPELLANT,

*vs.*

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 25, 1915.

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a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1912, of said Court, before the Honorable Elmer B. Adams and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Charles A. Willard, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to-wit: on the second day of December, A. D. 1911, a transcript of record pursuant to an appeal allowed by the Circuit Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein the United States of America is Appellant and Henry La Roque is Appellee, which said transcript as prepared and printed in pursuance of the stipulation of the parties for the use of the Court upon the hearing of said cause under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

(a)

2 Pleas before the Honorable the Judges of the Circuit Court of the United States of America, for the District of Minnesota, Sixth Division, at the May Term of said Court, held in said District, in the year of our Lord 1911.

District of Minnesota—ss.

The United States of America, Complainant,
No. 224. vs. In Equity.
Henry LaRoque, Defendant.

Be it remembered that on the 1st day of May, A. D. 1909, came the Complainant above named, by Charles C. Houpt, United States Attorney and Solicitor for said complainant, and filed in the Clerk's Office of said Court its Bill of Complaint in the words and figures following, to-wit:

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3 Bill of Complaint.

In the Circuit Court of the United States, for the District of Minnesota, Sixth Division.

The United States of America, Complainant,
vs. In Equity.
Henry LaRoque, Defendant.

To the Honorable the Judges of the Circuit Court of the United States for the District of Minnesota, in Chancery Sitting:

The United States of America brings this its bill of complaint against Henry LaRoque, a resident of the County of Mahomen in said State and District. Thereupon your orator respectfully alleges and shows to your Honors:

That this suit is instituted under and by the direction and authority of the Attorney-General of the United States.

Your orator further shows that said defendant Henry LaRoque is a mixed-blood Indian and a member of the Chippewa Band of Indians, and is a resident of that portion of the White Earth Reservation now embraced in and forming a part of the County of Mahnomen in said State; that one Vincent La Roque, who was born January 19, 1883, and died in the year 1886, was the daughter of the said Henry LaRoque and his wife, Catherine LaRoque, who was also a Chippewa Indian and a member of the Chippewa Band of Indians in the State of Minnesota.

Your orator further shows that said White Earth Indian Reservation was heretofore and pursuant to the treaty with
4 said Chippewa Indians, proclaimed April 18, 1867, set apart and reserved by your orator for the exclusive use and occupancy of said band or tribe of Indians; that under and pursuant to the Act of January 14, 1889, (25 Statutes at Large, 642) entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota", the Chippewa Commission, as in said Act provided for was duly appointed to take a census of all of the Chippewa Indians residing upon said Reservation, and to include such in the census rolls for the purpose of informing your orator of all such Indians then being who were entitled to allotments upon said Reservation, under the provisions of the General Allotment Act of February 8, 1887, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and under the aforesaid Act of January 14, 1889.

Your orator further shows that in the making of said census roll of said Indians, said Chippewa Commission inadvertently and erroneously entered upon its said rolls the name of the said then deceased Indian child of the defendant.—Vincent LaRoque, and that thereafter the name of said deceased infant child was carried upon said census rolls the same as if she were then in being.

Your orator further shows that the officers and agents of your orator, acting upon the faith and credit of said census rolls, and assuming and believing that said Vincent LaRoque was in existence and entitled to the benefits of the aforesaid treaty and acts of Congress; did, on or about the 21st
5 day of July, A. D. 1902, inadvertently, erroneously and without authority of law, issue to and in the name of said deceased child of the defendant, to-wit: Vincent LaRoque, a trust patent, Number 455 White Earth Series, for the following described land situate in said Mahnomen County and being a portion of said White Earth Indian Reservation, to-wit:

The East Half of the Southwest quarter (E½SW¼) of Section 5, Township 144; Range 40.

That said patent for said allotment was issued under the aforesaid Acts of Congress, and more particularly under Section 5 of the said Act approved February 8, 1887, which said section reads as follows:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents

shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period.

And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Your orator further shows that the mother of said deceased child Vincent LaRoque is dead, and that the father of said child, defendant above named, claims to be the owner of the above described land as the heir of said deceased child, and, as your orator is informed and believes, said defendant is threatening and intending to sell and dispose of said land, under the claim and pretence of being the heir of said deceased child and having the right so to do by virtue of the issuance of the aforesaid trust patent for said land in the name of said deceased child.

And your orator charges that said patent so inadvertently, erroneously and unlawfully issued, is void and of no effect for the reason that said child was not in being at the time of the passage of said Act of January 14, 1889, and had been long deceased prior to the issuance of said patent in the name of said Vincent LaRoque; that said patent is, and at all times was, void and of no effect.

In Consideration Wherefore, and inasmuch as your orator can have no adequate relief except in this court, and to the end therefore that the defendant may, if he can, show why your orator should not have the relief prayed and make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of his remembrance, knowledge, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath—an answer under oath being expressly waived.

And your orator prays that your Honors may decree that said defendant has no estate, interest or lien whatsoever in, to, or upon said land; that said trust patent so inadvertently, erroneously and unlawfully issued to the said Vincent LaRoque, deceased as aforesaid, may be cancelled, annulled and

decreed void and of no effect, and that the title of your orator be decreed good and valid to the aforesaid land, and that said defendant, and all persons claiming any interest in said premises through or under him, be forever enjoined and restrained from asserting any claim whatsoever in and to said land adverse to your orator, and for such other and
7 further relief as the equity of the case may require and to your Honors may seem meet.

May it please your Honors to grant unto your orator a writ of subpoena of the United States of America, directed to said defendant and commanding him, on a day certain, to appear and answer unto this bill of complaint and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

CHAS. C. HOUPT,
United States Attorney, and Solicitor for Complainant.

Filed in the Circuit Court on May 1, 1909.

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9 Praecipe for Issuance of Subpoena in Chancery.

The Clerk of said Court will issue Chancery Subpoena in above entitled case.

This 1" day of May, 1909.

CHAS. C. HOUPT,
U. S. Attorney.

Filed in the Circuit Court on May 1, 1909.

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11 Order of May 1, 1909, for Issuance of Subpoena in Chancery.

The complainant herein having filed a Bill in Equity in this cause, on application of Charles C. Houpt, U. S. District Attorney and Solicitor for said complainant, it is hereby ordered that a Chancery Subpoena issue as therein prayed.

HENRY D. LANG, Clerk.
By L. A. Levorsen, Deputy.

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13 Subpoena in Chancery.

United States of America,

District of Minnesota, Sixth Division.

The President of the United States of America to Henry La-Roque—Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the clerk of the Circuit Court of the United States, for the District of Minnesota, on the first Monday of June next, at the City of Fergus Falls, then and there to answer the Bill of Complaint of the United States of America, filed against you on the 1st. day of May, A. D. 1909; hence fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st. day of May, 1909. Issued at my office in the City of St. Paul, under the seal of said Circuit Court, the day and year last aforesaid.

(Seal of the Court) HENRY D. LANG, Clerk.

Memorandum: The above named defendant to enter his appearance in this suit in the clerk's office aforesaid; on or before the day at which this writ is returnable; otherwise the bill may be taken pro confesso.

HENRY D. LANG, Clerk.

Chas. C. Houpt,
Complainant's Solicitor.

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15 Marshal's Return of Service of Subpoena in Chancery.

United States of America,
District of Minnesota—ss.

I hereby certify and return that I served the annexed Chancery Subpoena on the therein named Henry LaRoque by handing to and leaving a true and correct copy thereof with him personally at 13 miles E Mahnomen, in said District on the 14th. day of May, A. D. 1909.

WILLIAM H. GRIMSHAW,
U. S. Marshal.
By H. A. Rider, Deputy.

Endorsed: No. 224. Chancery Subpoena. Returnable to June Rules, 1909. Returned by Marshal and filed May 31, 1909. Henry D. Lang, Clerk. By L. A. Levorsen, Deputy.

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17 Appearance of Counsel for Defendant and Order Thereon.

The Clerk will enter my appearance for the defendant.

J. T. VAN METRE,
Mahnomen, Minesota.

Dated May 15th, 1909.

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This day comes the defendant, Henry LaRoque, by J. T. Van Metre, Esq., his Solicitor, on whose motion it is hereby ordered that the appearance of said defendant be and the same is hereby entered.

HENRY D. LANG, Clerk.
By L. A. Levorsen, Deputy.

Filed in the Circuit Court on May 17, 1909.

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19 Answer.

The answer of Henry LaRoque, the defendant, to the bill of complaint of the United States of America, Complainant.

The defendant now and at all times hereafter, saving and reserving to himself all manner of benefit and advantage of exception which can or may be taken, to the many errors, uncertainties, misrepresentations and insufficiencies in the complainants' said bill of complaint contained, for answer thereto, or to so much or to such parts thereof as this defendant is advised is material for him to make answer unto, he answers and says;

I.

That he admits that this suit is instituted under and by the direction and authority of the Attorney-General of the United States that the defendant is a mixed-blood Indian and a member of the Chippewa Band of Indians, and is a resident of that portion of the White Earth Reservation now embraced in and forming a part of the County of Mahnomen in said State; and he admits that the Vincent LaRoque, mentioned in complainant's bill of Complaint, was the son of this defendant and his wife, Catherine LaRoque, but not the daughter, as alleged by complainant.

II.

20 The defendant says that he is entirely uneducated, unable to read or write in any language, and is unable to writ his own name; and that by reason of the fact that he is entirely uneducated he kept no record of the birth and death of the said Vincent LaRoque, and does not now remember the dates of his birth and death, but from his best remembrance and recollection the said Vincent LaRoque was born during the year 1886, and died some time between the years of 1889 and 1892, and he so avers.

III.

The defendant admits that said White Earth Indian Reservation was heretofore and pursuant to the treaty with said

Chippewa Indians, proclaimed April 18, 1867, set apart and reserved by the complainant herein for the exclusive use and occupancy of said band or tribe of Indians; that under and pursuant to the Act of January 14, 1889, (25 Statutes at Large, 642) entitled "An Act for the relief and civilization of the Chippewa Indians in in the State of Minnesota", the said Commission, as in said act provided for, was duly appointed to take a census of all of the Chippewa Indians residing upon said reservation, and to include such in the census rolls for the purpose of informing the complainant herein of all such Indians then in being who were entitled to allotments upon said reservation, under the provisions of the General Allotment Act of February 8, 1887, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes", and under the aforesaid Act of January 14, 1889.

21

IV.

The defendant says that he admits that the officers and agents of the complainant herein, did, on the said 21st, day of July A. D. 1902, issue in the name of the said Vincent LaRoque, a trust patent, number 455 White Earth Series, for the following described land situate in said Mahnomen County, and being a portion of said White Earth Indian Reservation, to-wit: The East half of the Southwest quarter (E½ SW¼) of Section 5, Township 144, Range 40.

V.

The defendant says that he denies that in the making of said census roll of said Indians, said Chippewa Commission inadvertently and erroneously entered upon its said rolls the name of the said Vincent LaRoque, and he denies that the said officers and agents of the complainant herein acted upon the faith and credit of the said census rolls, when said officers and agents of the complainant issued said trust patent, and he denies that they inadvertently, erroneously and without authority of law issued said patent.

VI.

The defendant, further answering, alleges and asserts the truth to be, that during the year 1892, as near as the defendant can now remember, the officer and agent of the complainant herein, came to the home of this defendant where he then and still resides, for the purpose of making allotments, under the said Act of February 8, 1887, to this defendant and his

family; that the defendant then and there informed
22 and notified the said officer and agent of complainant, that the said Vincent LaRoque was then deceased, but notwithstanding such information and notification so received by the said officer and agent of complainant, said officer and agent forthwith proceeded to and did allot, in the name of the said Vincent LaRoque, the land above described. And the defendant further avers and alleges that after the year 1892, and a long time prior to the said 21st, day of July, A. D. 1902, the date on which patent was issued, the officers and agents of complainant had further knowledge and information that the said Vincent LaRoque was deceased as aforesaid.

VII.

The defendant, further answering, says that he admits that said patent for said allotment was issued under the aforesaid Acts of Congress, and more particularly under Section 5 of the said Act approved February 8, 1887, as said Section 5 is set forth in complainant's bill of complaint.

VIII.

The defendant admits that the mother of the said Vincent LaRoque is dead, and admits that he, the defendant, as the father of the said Vincent LaRoque, claims to be the owner of the above described land as the heir of said deceased child.

IX.

He denies that he is threatening and is intending to sell and dispose of said land, but he says and alleges that he intends to keep said land, subject only to the judgment of this Honorable Court, as a home, on which he now lives and on which he has lived for many years and on which he has placed many valuable and substantial improvements.

23 X.

The defendant, further answering, says that prior to the year 1892, the defendant, for and in behalf of the said Vincent LaRoque, placed many valuable and substantial improvements upon said land, and plowed and cultivated a sufficient number of acres thereon to entitle the said Vincent LaRoque to the allotment of said land by virtue and pursuant to the provisions of said treaty, approved April 18, 1867.

XI.

And this defendant, in addition to the foregoing answer, avers that the cause of action, if any there may be, arising to the complainant on account or by reason of the several al-

legations and complaints in said bill contained, did not accrue within six years before the said bill was filed; and this allegation the defendant makes in bar of the said complainant's bill and prays that he may have the same benefit therefrom as if he had formally pleaded the same.

XII.

And this defendant submits to this Honorable Court that all and every of the matters in the said complainant's bill of complaint mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity, and this defendant hopes that he shall have the same benefit of this defense as if he had demurred to complainant's bill.

And this defendant denies all unlawful actions whatsoever in said bill charged, without that any other matter or
24 thing material or necessary for this defendant to make answer unto, and not herein and hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of this defendant. All which matters and things this defendant is ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

His
HENRY LAROQUE. x x x x
Thumb Mark.

Witness to mark.
J. T. Van Metre,
Jas. Flammand.

J. T. Van Metre,
Solicitor for Defendant,
Mahnomen, Minnesota.

Filed in the Circuit Court on June 24, 1909.

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26 Replication.

The replication of United States of America, complainant, to the answer of Henry LaRoque, defendant.

This repliant saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith that it will aver and prove its said bill to be true, certain and sufficient in the law to be answered unto, and that the said an-

swer of the said defendant, is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant avers, and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

CHAS. C. HOUPT,
Solicitor for Complainant.

Filed in the Circuit Court on Aug. 18, 1909.

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* * * * * * *

27 (Pages 27 and 28 of original transcript are omitted pursuant to Stipulation of Counsel.)

30 Agreed Statement of Facts.

It is stipulated by and between the parties to the above entitled cause that the same may be heard and determined by the Court on the following agreed statement of facts, without other or further proof:

I.

That Henry and Catherine LaRoque were husband and wife and each a member of a band or tribe of mixed-blood Chippewa Indians; and during their married life resided on the White Earth Reservation in the State of Minnesota, and as such mixed-blood Chippewa Indians, were entitled to allotments on said reservation; that Vincent LaRoque, named in the Bill of Complaint filed herein, was the son of defendant Henry LaRoque and his now deceased wife, Catherine LaRoque, and was born prior to the passage of the Act of January 14, 1889, viz: in the year 1883, and whose name appears upon the census rolls of Chippewa Indians, made pursuant to the said Act of January 14, 1889.

II.

That application was made and filed in the name of the said Vincent LaRoque for allotment of the land mentioned in the said Bill of Complaint, in accordance with the Act of Congress of February 8, 1887, providing for allot-
31 ments of land in severalty to Indians, but that said Vincent LaRoque had died before the making and filing of said application for the allotment of said land to him, and before said allotment was made and allowed, as provided for by said Act.

III.

That on July 21, 1902, Trust Patent No. 455, White Earth Series, based on the aforesaid allotment, was issued in the name of the said deceased Indian, Vincent LaRoque, for the land described in the Plaintiff's Bill of Complaint, to-wit: The East Half of the Southwest Quarter (E½ of SW¼), of Section 5, Township 144, North of Range 40 West, Mahnomen County, Minnesota, which said Patent was issued in accordance with the provisions of Section 5 of the Act of Congress approved February 8, 1887.

IV.

That the defendant, Henry LaRoque, claims an interest in and to be the owner of said land as the father and sole heir at law of the deceased Vincent LaRoque, his son; because of the allotment of said land in the name of said deceased son and the issuance of said Trust Patent pursuant to said allotment and the Act of Congress, aforesaid.

V.

That the above named land is part of what is known as the White Earth Reservation, as set apart and established by treaty with the Chippewa Indians proclaimed April 18, 1867.

CHARLES C. HOUPT,
United States Attorney and Solicitor for Complainant.

J. T. VAN METRE,
Solicitor for Defendant.

32 Filed in the Circuit Court on January 24, 1911.

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34 Note of Issue.

Charles C. Houpt,
United States Attorney .

John T. Van Metre,
Attorney for Defendant.

Will the Clerk please file this note of issue and enter the cause on the May Term calendar of said Court for the 2nd. day of May, A. D. 1911.

CHAS. C. HOUPT,
United States Attorney.

Filed in the Circuit Court on April 15, 1911.

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Notice of Trial.

Please Take Notice that the issues of law and fact in the above entitled action will be brought on for trial at the next regular term of said court to be held in the court room, in the Post Office Building, in the City of Fergus Falls, on the 1st. Tuesday of May, A. D. 1911, being the 2nd. day of May, at the opening of said term on said day, or as soon
35 thereafter as counsel can be heard.

Very respectfully,

CHARLES C. HOUPT,
United States Attorney and Attorney for Plaintiff.

To

John T. Van Mere,
Attorney for Defendant,
Mahnomen, Minnesota.

Dated at St. Paul, Minnesota, April 11, A. D. 1911.

Due service of the within notice of trial is hereby admitted this 12th. day of April, A. D. 1911, at Mahnomen, Minn.

J. T. VAN METRE,
Attorney for Defendant.

Filed in the Circuit Court on April 15, 1911.

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37 Order for Dismissal of Bill of Complaint.

This cause came on to be heard upon the bill and answer and agreed statement of facts, and was argued on behalf of the complainant by Charles C. Houpt, United States Attorney, and on behalf of the defendant by John T. Van Metre. And the court having duly considered the same it is

Ordered, that the bill of complaint herein be, and the same is hereby, dismissed upon the merits.

Dated, June 2nd, A. D. 1911.

CHARLES F. AMIDON, Judge.

Filed in the Circuit Court on June 2, 1911.

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39 Decree.

The above entitled cause came on to be heard at Fergus Falls, in said district and division, at the May, 1911, term of said Court, upon the pleadings and agreed stipulation of facts, and was argued by counsel, Charles C. Houpt, Esq., United

States Attorney, apeared in behalf of the plaintiff and John T. Van Metre, Esq., for the defendant.

The Court having duly considered the same, it is

Ordered, Adjudged and Decreed that the plaintiff is not entitled to the relief prayed for in its bill of complaint, and that said bill is dismissed out of this court upon the merits.

CHARLES F. AMIDON, Judge.

Filed in the Circuit Court on Oct. 3, 1911.

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41 Petition for and Order Allowing Appeal.

The above named plaintiff, considering itself aggrieved by the decree entered in the above entitled cause on the 3rd day of October, 1911, does hereby appeal from the said decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specified in the Assignments of Error which are filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated October 5th, 1911.

CHARLES C. HOUPT,
United States Attorney and Solicitor for Plaintiff.

Order.

The foregoing petition on appeal is granted, and the claim of appeal herein made is allowed.

42 It is Further Ordered that a certified transcript of the record, testimony, and all proceedings herein be transmitted to the United States Circuit Court of Appeals for the Eighth Circuit within sixty days from the date hereof.

It is Further Ordered that this appeal act as supersedeas in said cause.

Dated October 5th, 1911.

CHARLES A. WILLARD, Judge.

Filed in the Circuit Court on Oct. 5, 1911.

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44 Assignments of Error.

Now comes the above named plaintiff and files the following assignments of error, upon which it relies in its ap-

peal from the decree of this Honorable Court filed herein on the 3rd day of October, 1911, in the above entitled cause:

I.

The Court erred in adjudging and decreeing that the plaintiff is not entitled to the relief prayed for in the bill of complaint herein .

II.

The Court erred in dismissing plaintiff's bill of complaint.

III.

The Court erred in not adjudging and decreeing that the plaintiff is entitled to the relief prayed for in its bill of complaint.

IV.

The Court erred in holding and deciding that the defendant is entitled to the land described in the bill of complaint herein.

45 Wherefore, plaintiff prays that the said decree filed herein dismissing plaintiff's bill of complaint upon the merits may be in all things reversed.

Dated October 5th, 1911.

CHARLES C. HOUPT,
United States Attorney and Solicitor for Plaintiff.

Filed in the Circuit Court on Oct. 5, 1911.

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47 Admission of Service of Citation.

Due and personal service of the citation on appeal in the above entitled case is hereby admitted this 6th day of October, 1911.

J. T. VAN METRE,
Attorney for Defendant.

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48 Citation.

The President of the United States of America, to Henry LaRoque, Defendant, and to John T. Van Metre, Solicitor for said defendant—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at the City of Saint Paul, Minnesota, sixty days from and after the day this citation bears date, pursuant to an order allowing an appeal, entered in the office of the Clerk of the United States

Circuit Court, District of Minnesota, Sixth Division, in that certain action Number 224, in which the United States of America is plaintiff and appellant and Henry La Roque is defendant and appellee, to show cause, if any there be, why the decree rendered against the said plaintiff and appellant, as in the said order allowing said appeal mentioned, should not be corrected and reversed and why speedy justice should not be done to the plaintiff in that behalf.

Witness: The Honorable Charles A. Willard, District Judge, at Minneapolis, Minnesota, this 5th day of October, A. D., 1911.

CHARLES A. WILLARD, Judge.

Filed in the Circuit Court on Oct. 9, 1911.

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50 Election to Have Record Printed in Circuit Court of Appeals.

Office of
United States Attorney,
District of Minnesota.

St. Paul, October 30, 1911.

L. A. Loversen, Esq.,
Deputy Clerk, U. S. Circuit Court,
Fergus Falls, Minn.

Sir:

Pursuant to Rule No. 23 of the United States Circuit Court, notice is hereby given that I elect to have the record in the case of the United States vs. Henry LaRoque printed under the supervision of the Clerk of the Circuit Court of Appeals for the Eighth Circuit. You are therefore requested to make your return accordingly.

Very respectfully,

CHAS. C. HOUPT,
United States Attorney for the
District of Minnesota.

Filed in the Circuit Court on Oct. 31, 1911.

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51 Clerk's Certificate to Transcript.

I, Louise B. Trott, Clerk of said Circuit Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for Eighth Circuit, that the foregoing, consisting of fifty pages, numbered consecutively from 1 to 50 inclusive, is a true and complete transcript of the Records,

Process, Pleadings, Orders, Final Decree and all other proceedings in said cause and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

Seal
U. S. Circuit Court
Sixth Division
Dist. of Minnesota.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at Fergus Falls in the District of Minnesota, this 29th day of November, A. D., 1911.

LOUISE B. TROTT, Clerk.
By L. A. Loversen, Deputy.

Filed Dec. 2, 1911. John D. Jordan, Clerk.

17 (*Appearance of Counsel for Appellant.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 3698.

UNITED STATES OF AMERICA, Appellant,
vs.
HENRY LA ROQUE.

The Clerk will enter my appearance as Counsel for the Appellant.
CHAS. C. HOUPT,
*U. S. Attorney and Attorney for Appellant.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 7, 1911.

(*Appearance of Counsel for Appellee.*)

The Clerk will enter my appearance as Counsel for the Appellee.
J. T. VAN METRE,
*Mahnomen, Minnesota.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 2, 1911.

(*Stipulation as to Printing Record.*)

It is hereby stipulated and agreed by and between counsel for the respective parties that pages 27 and 28 of the record returned by the Clerk of the United States Circuit Court to the Court of Appeals may be omitted from the printed record.

CHAS. C. HOUPT,
*United States Attorney and Attorney for Appellant.*
J. T. VAN METRE,
*Attorney for Appellee.*

Dated December 9th, 1911.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 12, 1911.

18 (*Order of Submission.*)

May Term, 1912, Thursday, May 16, 1912.

This cause having been called for hearing, argument was commenced by Mr. Charles C. Houpt for appellant, continued by Mr. R. J. Powell in behalf of counsel for appellee and concluded by Mr. Charles C. Houpt for appellant.

Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

19 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1912.

No. 3698.

UNITED STATES OF AMERICA, Appellant,
vs.
HENRY LA ROQUE, Appellee.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Before Adams and Smith, Circuit Judges, and Willard, District Judge.

Mr. Charles C. Houpt, U. S. Attorney, for Appellant.
Mr. R. J. Powell (Mr. J. T. Van Metre filed a brief), for Appellee.

WILLARD, *District Judge*, delivered the opinion of the Court:

The bill in this case was filed by the United States to set aside an Indian trust patent issued in the name of Vincent La Roque. The case was tried upon an agreed statement of facts from which it appears that the defendant, Henry La Roque, is the father of Vincent La Roque; that his mother is dead; that both father and mother were Chippewa Indians residing on the White Earth Reservation in Minnesota; that Vincent La Roque's name appeared on the census made under the provisions of the Act of January 14, 1889, known as the Nelson Act (25 St. 642); that an application for an allotment under this Act was made in his name; that he was not then alive; that after his death an allotment was made in his name and on July 21, 1902, a trust patent was issued in his name under the provisions of section 5 of the Act of 1887 (24 St. 388), for the land allotted, which is a part of the White Earth Reservation; and that the defendant the father claims to own the land described in the trust patent as the sole heir of his son Vincent.

Upon final hearing a decree was entered dismissing the bill.

There is nothing in the Nelson Act to indicate that lands should be allotted to Indians who died before the allotment was made.

20 The Act of 1887 and the Act of February 28, 1891 (26 St. 794), provide for an allotment to each Indian "located" on the Reservation. The Supreme Court in Fairbanks v. United States, 223 U. S. 215, affirming the judgment of this court in United States v. Fairbanks, 171 Federal 337, held that Indians born after the Nelson Act was passed were entitled to its benefits. Speaking of the word "located" it said:

"By such amendment the classification found in the act of February 8, 1887, is entirely omitted, and the language is: 'To each Indian located thereon one-eighth of a section of land.' The con-

clusion that plaintiffs in error draw from that provision is that being on the reservation at the instant of time the act was passed is a necessary condition. But such conclusion misses the meaning of the word 'located'. Of itself it has no reference to time. It has reference entirely to place and is used to designate upon what Indians the powers given by the act, when exercised, should operate—that is, 'to each Indian located' on the reservation. The act was a part of a scheme of legislation to have existence and continuity of action until its purpose should be completely fulfilled. See Oakes v. United States, 172 U. S. 304."

When the powers given by this Act "were exercised" with reference to Vincent La Roque he was not alive.

In Woodbury v. United States, 170 Federal 302, it appeared that after the passage of the Act of April 28, 1904 (33 St. 539), known as the Steerneson Act, Woodbury made an application for an allotment thereunder but died soon after. That Act declared that the President was authorized to make an allotment to each Indian now legally residing on the reservation. This court held that the heirs of Woodbury were not entitled to an allotment. It said:

"Until the allotment was made, Woodbury's right was personal—a mere float—giving him no right to any specific property. This right, from its nature, would not descend to his heirs. They, as members of the tribe were severally entitled to their allotments in their own right. To grant them the right of their ancestors, in addition to their personal rights, would give them an unfair share of the tribal lands. The motive underlying such statutes forbids such a construction."

Neither at the time the allotment was made nor at the time the trust patent was issued did Vincent La Roque or his heirs have any right to the land described therein.

This trust patent having been issued to a person not in being is void. Moffat v. United States, 112 U. S. 24. The court in that case said at page 31:

"The patents being issued to fictitious parties could not transfer the title, and no one could derive any right under a conveyance in the name of the supposed patentees. A patent to a fictitious
21 person is, in legal effect, no more than a declaration that the government thereby conveys the property to no one."

The government can maintain the suit. Heckman v. United States, April 1, 1912, — U. S., —, affirming the decision of this court in United States v. Allen, 179 Fed. 13.

The defendant, however, relies on the statutory limitations contained in the Act of March 3, 1891 (26 St. 1095). The trust patent was issued on July 21, 1902. The bill in this case was filed on May 1, 1909.

Section 8 of the Act of March 3, 1891, is as follows:

"SECTION 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

The Act itself treated of a variety of subjects connected with the public lands. It repealed the timber culture and the preemption acts; amended the homestead law, and amended the law relating to the sale of desert lands. There was no reference in it to Indian lands except in Section 10, which is as follows:

"That nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes, and the proceeds thereof to be placed in the Treasury of the United States; and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements, except as provided in section 5 of this act."

It is not necessary to consider the effect of this section any further than to say that it cannot strengthen the claim of the defendant.

Does the word patent as used in section 8 cover such a document as was issued by the government in this case?

In United States v. Rickert, 188 U. S. 432, the court speaking of trust patents issued under the allotment act of 1887, said:

"The 'patents' here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing, designed to show that for a period of twenty-five years the United States would hold the land allotted, in trust for the sole use and benefit of the allottee or, in case of his death, of his heirs, and subsequently, at the expiration of that period—unless the time was extended by the President—convey the fee, discharged of the trust and free of all charge or incumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent,
22 showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee."

The court referred to the enabling act of South Dakota which after providing that its constitution should contain certain declarations relating to the Indians, declared that nothing therein provided should preclude the state from taxing lands held and owned by an Indian who had obtained from the United States title thereto by patent or other grant. It then said:

"The patent or grant here referred to is the final patent or grant which invests the patentee or grantee with the title in fee, that is, with absolute ownership. No such patent or grant has been issued to these Indians."

In the case of a true land patent the negotiations and dealings between the government and the patentee are at an end when the patent is issued. But in cases like the one here in question the relations between the government and the Indian are not terminated when the trust patent is issued. The United States still holds the legal title and it does not lose its interest in the land until the expiration of the trust period. So long as this relation continues there seems to be no reason why any limitations should be placed upon its power to enforce in the courts any rights which it may have.

It should also be considered that in the case of an ordinary land

patent no one but the government and the patentee are interested. If the patent is set aside the government becomes again the real owner of the property. In the case of Indian lands this is not true. Although the legal title is in the government yet the Indians are in a way the beneficial owners of the property. It is the duty of the government to distribute the land among the Indians entitled thereto. If the patent in this case is set aside the government will not become the actual owner of the land, but it will be its duty to allot it to some other Indian Its power to perform its duty in this respect should not be limited at least during the trust period.

It is also to be observed that by the act of April 23, 1904 (33 St. 297), presently to be mentioned, the Secretary of the Interior is given power during the whole of the trust period to cancel the trust patent under certain conditions. It would seem strange indeed, to limit the power of the courts with reference to such patents to six years when a similar power is given to an administrative officer for 25 years. The defense based upon this statute of limitations cannot prevail.

The defendant relies also upon the act of April 23, 1904, 33 St. 297. That act provides as follows:

"That the Act of Congress approved January twenty-sixth, eighteen hundred and ninety-five (Twenty-eighth Statutes, 23 six hundred and forty-one), entitled 'An Act authorizing the Secretary of the Interior to correct errors where double allotments of land have erroneously been made to an Indian, to correct errors in patents, and for other purposes,' be, and the same is hereby, amended to read as follows:

"'That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian, and for which a conditional patent may have been issued, to rectify and correct such mistakes and cancel any patent which may have been thus erroneously and wrongfully issued whenever in his opinion the same ought to be canceled for error in the issue thereof, and if possession of the original patent can not be obtained, such cancellation shall be effective if made upon the records of the General Land Office; and no proclamation shall be necessary to open to settlement the lands to which such an erroneous allotment patent has been canceled, provided such lands would otherwise be subject to entry: And provided, That such lands shall not be open to settlement for sixty days after such cancellation: And further provided, That no conditional patent that shall have heretofore or that may hereafter be executed in favor of any Indian allottee, excepting in cases hereinbefore authorized, and excepting in cases where the conditional patent is relinquished by the patentee or his heirs to take another allotment, shall be subject to cancellation without authority of Congress.'"

The act which it amended (28 St. 641), is as follows:

"That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian and for which a conditional patent may have been issued, to rectify and correct such mistakes and cancel any patent which may have been erroneously and wrongfully issued, whenever in his opinion the same ought to be canceled for error in the issue thereof, or for the best interests of the Indian, and, if possession of the original patent cannot be obtained, such cancellation shall be effective if made upon the records of the General Land Office and no proclamation shall be necessary to open the lands so allotted to settlement."

A comparison of these laws shows that the former was intended to limit the power of the secretary to cases specifically mentioned
24 therein and not to allow him to cancel any trust patent whenever he thought it ought to be canceled for the best interests of the Indian, a power which perhaps was given to him by the act of 1895.

Neither act deals in any way with the power of the courts. It cannot be assumed that Congress intended to give to the secretary power to cancel a trust patent for certain reasons at any time within twenty-five years and at the same time to take away from the courts the power to entertain a suit by the government to cancel a patent on any of the grounds then well recognized as being sufficient to move the courts to action. If the contention of the defendant be sustained then the government cannot maintain an action to set aside a trust patent for fraud. Under the act of 1904 the secretary has no power to set aside such patent. The only remedy in such a case therefore would be an appeal to Congress. This result never could have been intended.

The decree of the court below is reversed and the case remanded with instructions to enter a decree as prayed for in the bill with the exception, however, that the decree shall provide that the Government holds the land in the same way in which it held it before the patent was issued.

Judge Smith concurs in the result.

Filed July 8, 1912.

25 (*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1912, Monday, July 8, 1912.

No. 3698.

UNITED STATES OF AMERICA, Appellant,
vs.
HENRY LA ROQUE.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed without costs to either party in this Court.

It is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the District of Minnesota, as the successor of the Circuit Court for said District, with directions to enter a decree as prayed for in the bill with the exception, however, that the decree shall provide that the Government holds the land in the same way in which it held it before the patent was issued.

July 8, 1912.

(*Petition for Appeal to the Supreme Court U. S.*)

Your petitioner, Henry La Roque, respectfully represents that there is manifest error committed to the injury of the petitioner by the final decree pronounced in this case on the 8th day of July, 1912, in and by which final decree this court reversed the decree and judgment of the United States Circuit Court for the Eighth Circuit,

26 with directions to enter a decree as prayed for in the Bill with exception that the decree shall provide that the Government holds the land in the same way in which it held it before the patent was issued.

Wherefore, your petitioner, Henry La Roque, considering himself ag-rieved, prays an order granting an appeal from said final decree reversing the decree and judgment of the United States Circuit Court, for the Eighth Circuit and District of Minnesota, with directions to enter a decree as prayed for in the Bill, as aforesaid, to the Supreme Court of the United States, as authorized by the Act of Congress, entitled, "An Act For the relief of Henry La Roque", Approved, July 17th, 1914, and prays this Honorable Court that said

appeal be allowed, and that a transcript of the records, proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States, and that pending said appeal further proceedings under said final decree, so far as the same relates to said Henry La Roque, may be stayed by the order of this court.

Your petitioner herewith files and offers his bond in the penalty of Five Hundred Dollars, and asks that the same be approved, and that the appeal be allowed.

J. T. VAN METRE,
*Attorney for Henry La Roque, Mahnomen, Minnesota.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 7, 1914.

(*Assignment of Errors on Appeal to the Supreme Court U. S.*)

Now comes the said Henry La Roque and for his assignment of errors in the above entitled action, says that in the final decree heretofore made and entered in said cause by the court aforesaid there is error in the respects hereinafter set forth, that is to say:

1. The court erred in not affirming the judgment of the Circuit Court.

2. The Court erred in reversing the decree of the Circuit Court, and remanding the case with instructions to enter a decree as prayed for in the bill of complaint.

27 3. The court erred in holding that Vincent La Roque was not entitled to an allotment under the acts of February 8, 1887, and January 14, 1889.

4. The court erred in holding that Vincent La Roque was not entitled to an allotment under the acts of February 8, 1887, and January 14, 1889, because he had died and was not in being when the allotment was actually made in his name.

5. The Court erred in holding that although Vincent La Roque was in being when the census was prepared as provided in the act of January 14, 1889, and enumereated on said census, did not entitle him to an allotment.

6. The court erred in holding that there is nothing in the Nelson Act (Act of January 14, 1889) to indicate that lands should be allotted to Indians who died before the allotment was made.

7. The court erred in holding that *h*either at the time the allotment was made nor at the time the trust patent was issued did the heirs of Vincent La Roque have any right to the land described therein.

8. The court erred in holding that this trust patent, having been issued to a person not in being, is void.

9. The court erred in holding that the statute of limitations contained in Section 8 of the act of March 3, 1891, c. 561, 26 Stat. 1095, does not apply to the trust patent in this case.

10. The court erred in holding that the trust patent is not a

"patent" within the meaning of Section 8 of the act of March 3, 1891.

11. The court erred in holding that so long as the United States had an interest in the land, there is no reason why any limitations should be placed upon its power to enforce in the courts any rights which it may have.

12. The court erred in holding that because, under the act of April 23, 1904 (33 Stat. 297), the Secretary of the Interior is authorized to cancel a patent for certain specified reasons, the power of the court should not be limited.

28 13. The court erred in not holding that by reason of Vincent La Roque being alive and enumerated on the census roll as provided by section 1 of the act of January 14, 1889, he was then and there entitled to an allotment.

14. The court erred in not holding that all had been done in Vincent La Roque's behalf that could be done to entitle him to an allotment, and that because the officers of the United States neglected to make the allotment to him until after his death, could not deprive him of his right to an allotment.

15. The court erred in not holding that the territory comprising the White Earth Indian Reservation was purchased by the Chippewa Indians of Minnesota from the United States for a valuable consideration, and it thereby became the property of said Chippewa Indians.

16. The court erred in not holding that the Chippewa Indians of Minnesota held the fee in common to the territory comprising the White Earth Reservation.

17. The court erred in not holding that under the act of January 14, 1889, the deminished White Earth Reservation was retained by the Indians for the express purpose of partition and allotment of the lands among them upon the ratification of said act.

18. The court erred in not holding that the commissioners, appointed by the President under the act of January 14, 1889, promised these Indians, while negotiating with them for the cession of their lands, that if they ratified said act they and their children would be entitled to allotments.

19. The court erred in not holding that the United States through its said commissioners made the Indians understand and believe that the census, as provided for in said act of January 14, 1889, was for the purpose and to show that each of them was entitled to an allotment.

20. The court erred in not holding that the trust patent issued in the name of Vincent La Roque was in fact a patent in fee simple, by virtue of the act of June 21, 1906, (34 Stat. at L. 325), as amended by the act of March 1, 1907, (34 Stat. at L. 1015), and thereby coming within the provisions of section 8 of the act of Marc- 3, 1891, c. 561, 26 Stat. 1095.

29 Wherefore, said Henry La Roque prays that the final decree of said Circuit Court of Appeals of the United States for the Eighth Circuit in the above entitled cause, so far as it relates to him, or to any of the matters assigned as errors, for the

errors aforesaid and for other errors in the record and proceedings in said cause and in the final decree aforesaid, may be reversed and the said judgment of the United States Circuit Court for the District of Minnesota be affirmed.

J. T. VAN METRE,
*Attorney for Defendant, Mahnomen, Minnesota.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 7, 1914.

(*Bond on Appeal to the Supreme Court U. S.*)

Know all men by these presents, That we, Henry La Roque, as principal, and Herman A. Krostue and Lucky S. Waller, as sureties, are held and firmly bound unto the United States of America in the sum of Five Hundred Dollars ($500.00) to be paid to the United States of America, to which payment well and truly to be made we bind ourselves and our heirs and our successors jointly and severally by these presents.

Sealed with our seals and dated this 25th day of July, A. D. 1914.

Whereas the said Henry La Roque has taken and prosecuted his appeal to the Supreme Court of the United States to reverse the final decree heretofore made and filed in the above entitled cause by said Circuit Court of Appeals of the United States for the Eighth Circuit:

Now, therefore, the condition of this obligation is such that if the above named Henry La Roque shall prosecute his said appeal to effect and answer all costs and damages that may be adjudged or awarded against him if he shall fail to make good his appeal,
30 then this obligation to be void; otherwise to remain in full force and virtue.

His
HENRY x LA ROQUE. [SEAL.]
mark.
HERMAN A. KROSTUE. [SEAL.]
LUCKY A. WALLER. [SEAL.]

Signed, Sealed and Delivered in the Presence of—
N. D. JOHNSON.
LOUIS D. DAVIS.

STATE OF MINNESOTA,
*County of Mahnomen, ss:*

On this 25th day of July, 1914, before me personally appeared Henry La Roque, Herman A. Krostue and Lucky S. Waller, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[SEAL.] LOUIS D. DAVIS,
*Notary Public, Mahnomen County, Minnesota.*

My commission expires Sept. 17, 1914.

STATE OF MINNESOTA,
*County of Mahnomen, ss:*

Herman A. Krostue and Lucky S. Waller being first duly sworn, depose and say, and each for himself severally deposes and says that he is a freeholder of the State of Minnesota, and that he is worth over and above all his just debts and liabilities and over and above all property exempt from execution the sum of One Thousand Dollars.

HERMAN A. KROSTUE.
LUCKY S. WALLER.

Subscribed and sworn to before me this 25th day of July, 1914.
[SEAL.]
LOUIS D. DAVIS,
*Notary Public, Mahnomen County, Minnesota.*

My commission expires Sept. 17, 1914.

31 The foregoing bond and the sureties thereon are hereby approved.
WALTER I. SMITH,
*Circuit Judge.*

Dated July 30th, 1914.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 7, 1914.

(*Affidavit as to Amount in Controversy.*)

STATE OF MINNESOTA,
*County of Mahnomen, ss:*

Henry La Roque and Paul La Roque each for himself, deposes and says, that he has been upon the East half of the South-west quarter of section five (5), Township one hundred and forty-four (144) North, of Range Forty (40), West, State of Minnesota; that the said tract of land has valuable improvements thereon, and that he knows the value of said tract of land and that the same is worth and of the value of over Two Thousand Dollars, besides the costs of this action, and each deposes and says that the matter in controversy in said cause exceeds $2,000.00, besides the costs of said action.

His
HENRY x LA ROQUE.
mark.
PAUL LA ROQUE.

Subscribed and sworn to before me this 30 day of December, 1913.
[SEAL.]
L. G. SANDERS,
*Notary Public, Mahnomen County, Minnesota.*
*My commission expires: —. Notary Public, Mahnomen County, Minn.*

My commission expires Jan. 5, 1914.

(Endorsed:). Filed in U. S. Circuit Court of Appeals, Aug. 7, 1914.

32 *(Certified Copy of Act of Congress Permitting Appeal by Henry La Roque within Ninety Days from July 17, 1914.)*

**No. 4727.**

UNITED STATES OF AMERICA.

(Seal.)

DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I Certify That hereto annexed is a true copy of an Act of Congress, approved July 17, 1914, the original of which is on file in this Department, entitled "An Act for the Relief of Henry La Roque."

In testimony whereof I, W. J. Bryan, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, this twenty-third day of July, 1914.

[SEAL.]

W. J. BRYAN,
*Secretary of State.*
By BEN. G. DAVIS,
*Chief Clerk.*

(Private—No. 74—63d Congress.)

(H. R. 14229.)

An Act for the Relief of Henry La Roque.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Henry La Roque, an Indian of the White Earth Indian Reservation, in the State of Minnesota, be, and he is hereby, permitted to appeal within ninety days after the passage of this Act from the decree entered in the United States Circuit Court of Appeals for the Eighth Circuit on the eighth day of July, nineteen hundred and twelve, in a suit wherein the United States is the appellant and Henry La Roque the appellee, to the Supreme Court of the United States, giving such notice or notices and taking such proceedings as are required
33 by law and practice in such cases to effect such appeal. To enable such appeal to be taken and perfected the time therefor and for all notices and proceedings provided in the law or practice to be given or taken is hereby extended until the expiration of the period of ninety days from and after the passage of this Act.

Approved, July 17, 1914.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 7, 1914.

*(Order Allowing Appeal to the Supreme Court U. S.)*

The above named Henry La Roque having prayed for the allowance of an appeal to the Supreme Court of the United States from the final decree heretofore made and filed in the above entitled cause, reversing the decree of the United States Circuit Court for the District of Minnesota, Eighth Circuit, with directions to enter a decree as prayed for in the Bill with exception that the decree shall provide that the Government holds the land in the same way in which it held it before the patent was issued, so far as the same relates to said Henry La Roque, or to any of the matters assigned by him as error in his assignment of errors filed herewith, and that pending said appeal further proceedings under said final decree may be stayed by the order of this court; and said Henry La Roque having filed a bond with surety satisfactory to this court, in the penalty of Five Hundred Dollars, conditioned on the prosecution of said appeal to effect by said Henry La Roque and to answer all damages and costs if said Henry La Roque fails to make said appeal good;

It is now therefore ordered that said appeal of said Henry La Roque be, and the same is, hereby allowed; that said bond be, and the same is, hereby approved, and that further proceedings under said final decree be, and the same are, hereby stayed pending said appeal.

WALTER I. SMITH, *Judge.*

Dated July 30th, 1914.

34 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 7, 1914.

35 United States Circuit Court of Appeals, Eighth Circuit.

No. 3698.

UNITED STATES OF AMERICA, Appellant,
vs.
HENRY LA ROQUE, Appellee.

***Citation.***

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be at the Supreme Court of the United States at Washington, on the 29th day of August, A. D. 1914, pursuant to an order granting an appeal from a final decree filed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, wherein you are appellee and Henry La Roque is appellant, to show cause, if any there be, why the final

decree mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter I. Smith one of the judges of the United States Court of Appeals, 8th Circuit, this 30th day of July, in the year of our Lord one thousand nine hundred and fourteen.

WALTER I. SMITH,
*Circuit Judge.*

Service of the above citation admitted this 21st day of August, 1914.

ALFRED JAQUES,
*United States Attorney and*
*Solicitor for United States.*

36 [Endorsed:] United States Circuit Court of Appeals, Eighth Circuit. No. 3698. United States of America, Appellant, vs. Henry La Roque, Appellee. Citation on Appeal of Henry La Roque. Filed Aug. 24, 1914. John D. Jordan, Clerk. J. T. Van Metre, Attorney for Henry La Roque, Mahnomen, Minnesota.

37 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the Circuit Court of the United States for the District of Minnesota as prepared and printed, in pursuance of the stipulation of the parties and upon which said cause was heard and determined, under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the United States of America is Appellant and Henry La Roque is Appellee, No. 3698, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with admission of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the twenty-third day of September, A. D. 1912, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the District of Minnesota.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this twenty-fifth day of August, A. D. 1914.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court*
*of Appeals for the Eighth Circuit.*

Endorsed on cover: File No. 24359. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 615. Henry La Roque, appellant, vs. The United States. Filed August 31, 1914. File No. 24359.

# In the Supreme Court of the United States.

OCTOBER TERM, 1914.

HENRY LA ROQUE, APPELLANT,
*v.*
THE UNITED STATES.
No. 615.

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

**MOTION BY THE UNITED STATES TO ADVANCE.**

Comes now the Solicitor General and moves the court to advance this cause for hearing on a day convenient to the court during the next term.

This was a bill in equity filed by the United States in the Circuit Court for the District of Minnesota, praying for the cancellation of a trust patent issued in the name of Vincent La Roque for an allotment of land on the White Earth Indian Reservation pursuant to the provisions of the act of February 8, 1887, 24 Stat. 388, commonly called the "Dawes Act," and the act of January 14, 1889, 25 Stat. 642, commonly called the "Nelson Act."

The bill avers, among other things, that said White Earth Indian Reservation was, by treaty with the Chippewa Indians under date of April 18, 1867, set apart for the exclusive use of said Indians, and that under the "Nelson Act," a commission was ap-

pointed to take a census of the said Indians for the purpose of making allotments and payments under both said acts.

The bill further avers that in making said census roll the name of Vincent La Roque was entered as being then in existence and that the allotment herein involved was accordingly made in her name and approved by the Secretary of the Interior; that said Vincent La Roque was born in 1883 and died in 1886; and charges said patent to be void for the reason that said Vincent La Roque was not in being at the time of the passage of the "Nelson Act."

The Circuit Court dismissed the bill and an appeal was taken by the United States to the Circuit Court of Appeals for the Eighth Circuit which reversed the action of the Circuit Court and held *inter alia* that there was nothing in the "Nelson Act" to indicate that lands should be allotted to Indians who died before the allotment was made.

The case is here on appeal authorized by the act of July 17, 1914, entitled "An act for the relief of Henry La Roque."

The question is of importance to the Department of the Interior, and as it involves an interpretation of the so-called "Nelson Act" and the rights of said Chippewa Indians thereunder, an early hearing by this court is desirable.

Opposing counsel concur.

JOHN W. DAVIS,
*Solicitor General.*

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# In the Supreme Court of the United States

October Term, 1914.

No. 240

HENRY LA ROQUE, Appellant,

*vs.*

THE UNITED STATES.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

## BRIEF FOR THE APPELLANT.

J. T. VAN METRE,
Solicitor for the Appellant,
Mahnomen, Minnesota.

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(24,359)

# In the Supreme Court of the United States

October Term, 1914.

No. 615

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HENRY LA ROQUE, Appellant,

*vs.*

THE UNITED STATES.

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Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

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## BRIEF FOR THE APPELLANT.

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### STATEMENT OF THE CASE.

This is an appeal from the decree of the Circuit Court of Appeals for the Eighth Circuit, reversing the decree of the Circuit Court of the United States for the District of Minnesota in favor of the appellant. See Record, pp. 12, 13, for decree of the Circuit Court, dismissing complainant's bill, and Record, pp. 18-22, for opinion of the Circuit Court of Appeals.

The right to prosecute this appeal is found in the Act of Congress, entitled, "An Act for the Relief of Henry La Roque," approved July 17, 1914. (R. p. 28.)

This suit was brought by the United States to cancel a patent issued by the United States on July 21, 1902, in the name of Vincent La Roque, covering an Indian allotment of eighty acres located within the White Earth Indian Reservation in the State of Minnesota.

This appellant, Henry La Roque, and Catherine, were husband and wife, mixed-blood Chippewa Indians belonging on the White Earth Indian Reservation, Minnesota, and the parents of Vincent La Roque to whom the allotment in question was made. The appellant claims to be the owner of the land as the father and sole heir of the deceased Vincent La Roque. (R. 10, 11.) No fraud is charged in obtaining the issuance of the patent.

That part of the White Earth Indian Reservation where this allotment is situated, lies within the exterior boundaries of the territory ceded to the United States by the Chippewa Indians under the treaty of February 22, 1855, 10 Stat. 1165.

By Article 2 of the treaty of March 19, 1867, proclaimed April 18, 1867, 16 Stat. 719, with the Chippewa of the Mississippi, the territory comprising the White Earth Indian Reservation, was set apart for the use of these Indians, and received by them in part consideration for the cession of lands to the United States under the agreement.

Under Section 3 of the Act of January 14, 1889, 25 Stat. 642, commonly known as the Nelson Act, allotments were to be made to these Chippewa Indians "in conformity" with the Act of February 8, 1887, 24 Stat. 388, known as the General Allotment Act; and Section 1 provided that the commission therein mentioned,

while engaged in securing the cession of certain lands and before completing the same, was to make a census of each tribe or band "for the purpose of making the allotments and payments" mentioned in said Act.

Vincent La Roque was in being, at the time of the ratification of the Act of January 14, 1899, by the Indians, and was enumerated upon the census roll prepared by the commission under said Act; that after the ratification of said act by the Indians and after the completion of said census, but before the allotment was actually made and set apart to Vincent La Roque, he died.

The patent sought to be cancelled was issued on July 21, 1902, and the United States filed its bill of complaint on May 1st, 1909, six years, nine months and ten days after the issuance of the patent.

The Circuit Court of Appeals was of opinion (R. 18-22) that

> * * * there is nothing in the Nelson Act to indicate that lands should be allotted to Indians who died before the allotment was made, and the trust patent having been issued to a person not in being is void; that as the Act of April 23, 1904, 33 Stat. 297, authorizes the Secretary of the Interior to cancel patents to allotments for certain specified reasons during the trust period, it would seem strange to limit the power of the Courts with reference to such allotments to six years.

The result of the Court's reasoning was a reversal of the decree of the Circuit Court.

For reasons to be stated, the appellant contends that the Nelson Act provides that those Indians, par-

ties to the ratification of the Act of January 14, 1889, and their children, enumerated on the census, were then and there entitled to allotments; that Acts of Congress of June 21, 1906, 34 Stat. pt. 1, ch. 3504, p. 325 (353), knowi as the Clapp Amendment, and March 1, 1907, 34 Stat, ch. 2285, p. 1015 (1034), amendatory thereto, which latter act provides:

> "That all restrictions as to sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, heretofore or hereafter held by adult mixed blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application."

made these patents, as to allotments held by mixed bloods, patents in fee simple; and the statute of limitations contained in section 8 of the Act of March 3, 1891, ch. 561, 26 Stat. 1099, is a bar to the prosecution of this suit by the United States.

## ASSIGNMENTS OF ERROR.

### I.

The court erred in not affirming the judgment of the Circuit Court.

II.

The Court erred in reversing the decree of the Circuit Court, and remanding the case with instructions to enter a decree as prayed for in the bill of complaint.

III.

The court erred in holding that Vincent La Roque was not entitled to an allotment under the acts of February 8, 1887, and January 14, 1889.

IV.

The court erred in holding that Vincent La Roque was not entitled to an allotment under the acts of February 8, 1887, and January 14, 1889, because he had died and was not in being when the allotment was actually made in his name.

V.

The court erred in holding that although Vincent La Roque was in being when the census was prepared as provided in the act of January 14, 1889, and enumerated on said census, did not entitle him to an allotment.

VI.

The court erred in holding that there is nothing in the Nelson Act (Act of January 14, 1889) to indicate that lands should be allotted to Indians who died before the allotment was made.

VII.

The court erred in holding that neither at the time the allotment was made nor at the time the trust patent was issued did the heirs of Vincent La Roque have any right to the land described therein.

VIII.

The court erred in holding that this trust patent, having been issued to a person not in being, is void.

IX.

The court erred in holding that the statute of limitations contained in Section 8 of the act of March 3, 1891, c. 561, 26 Stat. 1095, does not apply to the trust patent in this case.

X.

The court erred in holding that the trust patent is not a "patent" within the meaning of Section 8 of the act of March 3, 1891.

XI.

The court erred in holding that so long as the United States had an interest in the land, there is no reason why any limitations should be placed upon its power to enforce in the courts any rights which it may have.

XII.

The court erred in holding that because, under the act of April 23, 1904 (33 Stat. 297,) the Secretary of the Interior is authorized to cancel a patent for certain specified reasons, the power of the court should not be limited.

XIII.

The court erred in not holding that by reason of Vincent La Roque being alive and enumerated on the census roll as provided by section 1 of the act of January 14, 1889, he was then and there entitled to an allotment.

XIV.

The court erred in not holding that all had been done in Vincent La Roque's behalf that could be done to entitle him to an allotment, and that because the officers of the United States neglected to make the allotment to him until after his death, could not de-

prive him of his right to an allotment.

XV.

The court erred in not holding that the territory comprising the White Earth Indian Reservation was purchased by the Chippewa Indians of Minnesota from the United States for a valuable consideration, and it thereby became the property of said Chippewa Indians.

XVI.

The court erred in not holding that the Chippewa Indians of Minnesota held the fee in common to the territory comprising the White Earth Reservation.

XVII.

The Court erred in not holding that under the act of January 14, 1889, the diminished White Earth Reservation was retained by the Indians for the express purpose of partition and allotment of the lands among them upon the ratification of said act.

XVIII.

The court erred in not holding that the commissioners, appointed by the President under the act of January 14, 1889, promised these Indians, while negotiating with them for the cession of their lands, that if they ratified said act they and their children would be entitled to allotments.

XIX.

The court erred in not holding that the United States through its said commissioners made the Indians understand and believe that the census, as provided for in said act of January 14, 1889, was for the purpose and to show that each of them was entitled to an allotment.

XX.

The court erred in not holding that the trust patent issued in the name of Vincent La Roque was in fact a patent in fee simple, by virtue of the act of June 21, 1906, (34 Stat. at L. 325), as amended by the act of March 1, 1907, (34 Stat. at L. 1015), and thereby coming within the provisions of section 8 of the act of March 3, 1891, c. 561, 26 Stat. 1095.

## BRIEF OF ARGUMENT.

### I.

### Legislative History of the Territory Comprising the White Earth Reservation.

### II.

### The Indians' Title to the White Earth Reservation.

1. The title the Indians had to the White Earth Reservation was that of a fee simple, it having been conveyed to them by the United States as part consideration for lands ceded by them to the government.

Art. 2, Treaty of April 18, 1867, 16 Stat. 719.

New York Indians vs. United States, 170 U. S. 1, 42 L. ed. 927.

Holden vs. Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523.

United States vs. Brooks, 10 How. (U. S.) 442, 13 L. ed. 489.

Marsh vs. Brooks, 8 How. (U. S.) 223, 10 L. ed. 1056.

United States vs. Choctow Nation, 179 U. S. 494, 45 L. ed. 291.
White vs. Wright, 83 Minn. 222, 86 N. W. 91.
Seneca Nation vs. Hugaboom, 132 N. Y. 493, 30 N. E. 983.
Prentice vs. Stearns, 20 Fed. 819.
United States vs. Reese, 27 Fed. 5 Dill. 405.
Mitchel vs. United States, 15 Pet. 52, 10 L. ed. 658.

(a) Where a treaty contains words of conveyance it operates as a grant *in praesenti*, and the title vests by operation of the treaty.

Jones vs. Meehan, 175 U. S. 1, 44 L. ed. 49.
United States vs. New York Indians, 173 U. S. 464, 43 L. ed. 769.
New York Indians vs. United States, 170 U. S. 1, 42 L. ed. 927.
Webster vs. Reid, Morr. (Iowa) 467.
United States vs. Brooks, 10 How. 442, 13 L. ed. 489.

(b) The land ceded to the United States under the treaty of April 18, 1867, belonged to these Indians, and was a valuable consideration for the sale to them of the White Earth Reservation.

New York Indians vs. United States, 170 U. S. 1, 42 L. ed. 927.
Holden vs. Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523.

Mitchel vs. United States, 9 Pet. 748.
Crews vs. Burcham, 1 Black. 352, 17 L. ed. 91.

(c) It was proper for, and within the power of, the United States to convey the territory comprising the White Earth Reservation to the Indians, although it was then a part of the public domain.

Holden vs. Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523.

Johnson vs. McIntosh, 8 Wheat. 598, 5 L. ed. 694.

(d) While a patent to the White Earth Reservation was not given or promised by the treaty of April 18, 1867, yet a patent is not necessary to convey a complete title.

Francis vs. Francis, 203 U. S. 233, 51 L. ed. 165.
Jones vs. Meehan, 175 U. S. 1, 44 L. ed. 49.
United States vs. Brooks, 10 How. 442, 13 L. ed. 489.

(e) Restrictions upon alienation do not debase the title below a fee simple.

Libby vs. Clark, 118 U. S. 250, 30 L. ed. 133.

United States vs. Paine Lbr. Co., 206 U. S. 467, 51 L. ed. 1139.

## III.

## The Act of January 14, 1889, 25 Stat. 642.

1. The purpose of the Act. The Act was in all essentials a treaty, and was in its nature contractual.

Worcester vs. Georgia, 6 Pet. 515, 8 L. ed. 483.

Choat vs. Trapp, 224 U. S. 665, 56 L. ed. 941.

(a) The object of the census was to show, among other things, the persons then and there entitled to allotments under the act.

Sec. 1, Act of January 14, 1889, 25 Stat. 642.

(b) There is no inconsistency in permitting an allotment after death.

Act of July 1, 1902, 32 Stat. 641.

Mullen vs. United States, 224 U. S. 448, 56 L. ed. 834.

Goat vs. United States, 224 U. S. 458, 56 L. ed. 841.

United States vs. Dowden, 194 Fed. 475.

(c) Failure or refusal to make the allotment could not militate against the rights of the person entitled thereto.

Little vs. Arkansas, 9 How. 33, 13 L. ed. 153.

The Yosemite Valley Case, 15 Wall. 91, 21 L. ed. 82.
Smith vs. Bonifer, 132 Fed. 889.
United States vs. Dowden, 194 Fed. 475.

(d) This act must be construed in the light in which the Indians were made to understand it.

Worcester vs. Georgia, 6 Pet. 515, 8 L. ed. 483.
Jones vs. Meehan, 175 U. S. 1, 44 L. ed. 49.
Blue Jacket vs. Johnson County, 5 Wall. 737, 18 L. ed. 667.
Choctow Nation vs. United States, 119 U. S. 1, 30 L. ed. 306.
United States vs. Kagama, 118 U. S. 375, 30 L. ed. 314.
United States vs. Winans, 198 U. S. 371, 49 L. ed. 1089.
United States vs. Choctow Nation, 179 U. S. 449, 45 L. ed. 291.
Choat vs. Trapp, 224 U. S. 665, 56 L. ed. 941.

The report of the negotiations are contained in House Ex. Doc. 247, 51st Congress, 1st session.

The court may take judicial notice of such documents.

New York Indians vs. United States, 170 U. S. 1 (32), 42 L. ed. 927 (938).

2. The effect of the allotment.

Sec. 3, Act of Jan. 14, 1889, 25 Stat. 642.
Sec. 5, Act of Feb. 8, 1887, 24 Stat. 388.
Goat vs. United States, 224 U. S. 458, 56 L. ed. 841.
Libby vs. Clark, 118 U. S. 250, 30 L. ed. 133.
United States vs. Paine Lbr. Co., 206 U. S. 467, 51 L. ed. 1139.
36 Land Decisions, 210.
Smith vs. Bonifer, 132 Fed. 889.

(a) The law of descent in the State where the land is situated shall apply after issuance of the patent. Not the final patent, but the first or trust patent.

Sec. 5, Act. of Feb. 8, 1887, 24 Stat. 388.
Goat vs. United States, 224 U. S. 458, 56 L. ed. 841.
In Re Heff, 197 U. S. 488, 49 L. ed. 848.
United States vs. Park Land Co., 188 Fed. 383.
Beam vs. United States, 162 Fed. 260.
Worcester vs. Georgia, 6 Pet. 515 (582).
36 Land Decisions, 210.

(b) The law of descent in force in the State of Minnesota in 1902, when the patent was issued, provided:

"If the intestate leave no issue nor husband or wife his estate shall descend to his father."

Sub. Div. 3 of Sec. 4471, Statutes of Minnesota for 1894.

(c) Subsequent acts of congress giving the Secretary of the Interior jurisdiction to determine heirship of Indians do not apply to the descent of allotments on the White Earth Reservation.

Act of May 8, 1906, 34 Stat. 180.
Vachon vs. Nichols-Chisolm Lbr. Co. 126 Minn. 303, 148 N. W. 288.
36 Land Decisions, 210.
Kendall vs. United States, 12 Pet. 522.
Postal Tel. Cable Co., vs. Southern Ry. Co., 89 Fed. 190.
26 Am. & Eng. Ency. of Law, 714.
Endlich on Interpretation of Statutes, 695.
Southerland, Stat. Construction, Vol. 1, 2nd Ed. 493.

IV.

The Statute of Limitations is a bar to the right of action by the United States herein.

Sec. 8, Act of Mar. 3, 1891, c. 561, 26 Stat. 1099.

1. The instrument here sought to be cancelled is a "patent" within the meaning of the statute of limitations.

La Clair vs. United States, 184 Fed. 128.

(a) This court's expression in the case of United States vs. Rickert, 188 U. S. 432, 47 L. ed. 532, in so far as it implies that these instruments are not "patents" for the purpose of conveying restricted in-

alienable titles from the government to the Indian allottees, *is dictum,* lacking the force of a judicial determination, and is not controlling in this case.

McCormick Har. Machine Co. vs. C. Aultman Co., 169 U. S. 606, 42 L. ed. 875.

Harriman vs. Northern Securities Co. 244, 49 L. ed. 739.

Choat vs. Trapp, 224 U. S. 665, 56 L. ed. 941.

(b) Section 5 of the Act of February 8, 1887, defines these instruments to be "patents," and of "the legal effect."

24 Stat. 388.

Libby vs. Clark, 118 U. S. 250, 30 L. ed. 133.

(c) Repeated Acts of Congress have designated these instruments as "patents," some of which Acts are:

Act of March 3, 1875, 18 Stat. 402, Secs. 15, 16.

Act of July 4, 1884, 23 Stat. 76.

Act of Oct. 19, 1888, 25 Stat. 611, Secs. 1, 2.

Act of Jan. 26, 1895, 28 Stat. 641.

Act of May 27, 1902, 32 Stat. 245, Sec. 7.

Act of Feb. 21, 1865, 12 Stat. 658, Sec. 4.

Act of Jan. 23, 1873, 17 Stat. 417.

Act of Apr. 10, 1876, 19 Stat. 28, Sec. 5.

Act of June 15, 1880, 21 Stat. 199, (1st Condition), and Secs. 3, 4.

Act of Apr. 11, 1882, 22 Stat. 42, Sec. 1.
Act of Aug. 8, 1882, 22 Stat. 341, Sec. 6.
Act of Mar. 1, 1883, 22 Stat. 444, Sec. 1.
Act of Jan. 26, 1887, 24 Stat. 367, Sec. 3.

(d) This court in numerous decisions has termed these instruments "patents."

In Re Heff, 197 U. S. 488, 49 L. ed. 848.
Wiggans vs. Connolly, 163 U. S. 56, 41 L. ed. 69.
Starr vs. Campbell, 208 U. S. 527, 52 L. ed. 602.
Starr vs. Long Jim, 227 U. S. 613, 57 L. ed. 670.
Mullen vs. United States, 224 U. S. 448, 56 L. ed. 834.
Goat vs. United States, 224 U. S. 458, 56 L. ed. 841.
Choat vs. Trapp, 224 U. S. 665, 56 L. ed. 941.

(e) The complainant designates this instrument a "patent" in its bill of complaint.

Record, pp. 2, 3.

2. The Clapp Amendment of June 21, 1906, 34 Stat. 325, as amended by the Act of March 1, 1907, 34 Stat. 1015, expressly declares these instruments to have the effect of fee simple patents.

36 Land Decisions, 210.

(a) After the death of Vincent La Roque, and after the issuance of this patent in 1902, the appellant, admittedly an adult mixed-blood Indian, (R. pp. 2, 10) held this land in fee simple upon the approval of the Clapp Amendment.

United States vs. Park Land Co., 188 Fed. 383.

Beam vs. United States, 162 Fed. 260.

Stephenson vs. Lohn, 115 Minn. 166, 131 N. W. 1018.

Vachon vs. Nichols-Chisolm Lbr. Co., 126 Minn. 303, 148 N. W. 288.

(b) After the passage of the Clapp Amendment, had the appellant conveyed this allotment, on the strength of the patent his grantee would have become an innocent purchaser.

(c) Statutes of limitation are applicable to individual Indians after allotment.

Act of May 31, 1902, ch. 946, 32 Stat. 284.

Schrimpscher vs. Stockton, 183 U. S. 290, 46 L. ed. 203.

3. This court has repeatedly upheld the statutes of limitation.

United States vs. Des Moines Nav. & Ry. Co., 142 U. S. 510, 35 L. ed. 1099.

Curtner vs. United States, 149 U. S. 671, 37 L. ed. 800.

Wood vs. Carpenter, 101 U. S. 135.

United States vs. Hodge, 13 How. 478.
Clementson vs. Williams, 8 Cranch, 72.
M'Cluny vs. Silliman, 3 Pet. 270.
Richards vs. Maryland Ins. Co., 8 Cranch, 84.
Bank of United States vs. Daniel, 12 Pet. 32.
Lewis vs. Marshal, 5 Pet. 470.

V.

A patent is not void because issued after the patentee's death.

Rev. Stats. U. S., 1878, Sec. 2448.

1. Independent of section 2448, Rev. Stats., supra, the courts have always held that the title to the land designated in a patent issued in the name of an Indian reservee or allottee after his death, inured to his heirs, devisers or assigns.

Doe vs. Wilson, 23 How. 457, 16 L. ed. 584.
Elwood vs. Flannigan, 104 U. S. 562, 26 L. ed. 842.
Vachon vs. Nichols-Chisolm Lbr. Co., 126 Minn. 303, 148 N. W. 288.

(a) Yet this court has held directly that this law, section 2448, supra, applies to individual Indian lands.

Crews vs. Burcham, 1 Black, 352, 17 L. ed. 91.

## VI.

## The Act of April 23, 1904, 33 Stat. 297.

1. This act authorizes the Secretary of the Interior to cancel patent for only certain specified reasons.

(a) The cause for cancellation in the case at bar is none of those specified in the Act of April 23, 1904, and no fraud is charged in obtaining its issuance.

La Clair vs. United States, 184 Fed. 129 (137).

## ARGUMENT.

## I.

## Legislative History of the Territory Comprising the White Earth Reservation.

Prior to February 22, 1855, the entire territory comprising this reservation was what has always been denominated Indian Country, a country in which the United States recognized the Indian title from the very time of the foundation of its government, which was acquired by immemorial possession. On February 22, 1855, the Chippewa Indians ceded this territory, including a vast tract of land lying in the northern part of what is now the State of Minnesota, to the United States. Act of Feb. 22, 1855, 10 Stat. 1165. Under Article 2 there was reserved to these Indians a sufficient quantity of land for their

permanent homes, but none of the lands comprising the White Earth Reservation was included in these reservations. By this cession the Indian title to the lands thus ceded became extinguished and became the absolute property of the United States, wholly subject to its disposition by the government. Holden vs. Joy, 17 Wall. (U. S.) 211, 21 L. ed. 523.

By the treaty of March 7, 1864, proclaimed March 20, 1865, (13 Stat. 693) these Indians ceded to the United States a part of the lands reserved to them under Article 2 of the treaty of 1855. Under Article 2 of this treaty of 1864, there were still reserved by the Indians for their future homes, certain lands described in Article 1 thereof.

The United States desiring to acquire more of the lands reserved by the Indians under these former treaties, entered into the treaty of April 18, 1867, (16 Stat. 719), with these Chippewa, whereby there was ceded to the United States all of their lands in the State of Minnesota secured to them by the treaty of March 20, 1865, except certain lands described in Article 1, the last paragraph of which Article provides:

> "And there is further reserved for the said Chippewas out of the *land now owned by them* such portion of their western outlet as may upon location and survey be found to be within the reservation provided for in the next succeeding section."

Up to the time of the treaty of 1867, the territory comprising what is now the White Earth Reservation was still the property of the United States, the Indians having no title or claim thereto whatever.

Article 2 of this last treaty expressly provided that in part consideration for the lands ceded to the

United States by Article 1, there was set apart to them the White Earth Reservation as a suitable farming region. Article 7 provided for allotments under certain conditions, but, in the light of the Act of Jan. 14, 1889, hereinafter mentioned, it must be conceded that a very small amount of the lands were taken up as allotments under this treaty. The White Earth Reservation of thirty-six townships remained as such until 1889.

In 1887 congress passed what is now commonly known as the General Allotment Act. By it the government was inaugurating a general policy for all Indians with the end in view of individualizing them, placing them in separate homes, bestowing upon them the advantages as well as the duties incident to American citizenship, thereby breaking up and dissolving the traditional tribal relationship which had been practiced and adhered to by them from time immemoral. It will be observed, by reference to later congressional legislation on the subject, that this commendable policy has become more and more extended, thereby confirming that policy by placing the Indian in a more independent state, qualifying him to take a place in the business, social and political circles with his more enlightened white brother.

Many tribes of Indians concededly owned large tracts of land from which they derived no benefit, as they were unfamiliar with the industried pursuits recognized by civilization. The Act of 1887, therefore, provided for the cession of lands not required for allotments. The Chippewas owned large tracts in Minnesota which might be termed surplus lands, some of which were pine lands. It was determined that the

proceeds from the sale of this land and timber was about the only benefit the Chippewas would derive therefrom.

To specially induce the Chippewa Indians of Minnesota to abandon their tribal relations, take allotments in severalty in conformity with the General Allotment Act, and to cede to the United States all of their surplus lands in Minnesota, congress passed the Act of January 14, 1889, 25 Stat. 642, known as the Nelson Act. This act pertained only to the Chippewa Indians of Minnesota. The commission, provided for in the act to negotiate with the Indians for the cession of their surplus lands, was, for the purpose of ascertaining whether the proper number of Indians yielded and gave their assent to the terms of the act, and for the purpose of making the allotments and payments provided for in said act, while engaged in securing such cession and relinquishment and before completing the same, to make an accurate census of each tribe or band, classifying them into male and female adults and male and female minors.

The act was ratified by the Indians in the summer of 1889, a census made by the commission, approval by the President, and the act became the law. See House Ex. Doc. 247, 51st Congress, 1st session.

## II.

The Indians' Title to the White Earth Reservation.

1. Under the treaty of April 18, 1867, the White Earth Reservation was set apart to the Chippewas of the Mississippi. The title thereto must be determined under the treaty, having in mind the several treaties pertaining to that territory. It was held and affirmed

by this court in the case of Mitchel vs. United States 15 Pet. 52, 10 L. ed. 658, that "the right of the Indians in their lands is not that of mere occupancy and perpetual possession, but a right of property, held under the guaranty of treaties."

Prior to the treaty of 1867, this territory was the absolute property of the United States, the Indian title having been extinguished under the treaty of February 22, 1855. In the case of Holden vs. Joy, 17 Wall, 211, 21 L. ed. 523, the court, passing upon the same question with reference to the lands of the Osage Indians, said:

> "On the 2d of June, 1825, the Osage Indians, by the treaty of that date, ceded to the United States all their right, title, interest, and claims to the land lying.....west of the state of Missouri, with such reservations and for such considerations, as are therein specified, which, it is conceded, extinguished forever the title of the Osage Indians to the neutral lands."

Under Article 2 of the treaty now under consideration, the United States sold it to these Indians for a valuable consideration, namely, other lands ceded to the government admitted to be owned by the Indians. See last paragraph of Art. 1 of the treaty. Article 2 of the treaty provides:

> "In order to provide a suitable farming region for the said bands there is hereby set apart for their use a tract of land, to be located in a square form as nearly as possible, with lines corresponding to the Government surveys; which reservation shall include White Earth Lake and Rice Lake, and contain thirty-six townships of land: and such portions of the tract herein provided for as shall be found upon actual survey to

lie outside of the reservation set apart for the Chippewas of the Mississippi by the second article of the treaty of March 20, 1865, shall be received by them in part consideration for the cession of lands made by this agreement."

(a) The setting apart of this reservation to the Indians was a grant *in praesenti.* In the case of Jones vs. Meehan, 175 U. S. 1, 44 L. ed. 49, various grants from the United States to the Indians are fully discussed. This court had under consideration the construction of the following provision of the treaty of 1863 with the Red Lake and Pembina bands of Chippewa Indians:

> "Upon the urgent request of the Indians, parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of six hundred and forty acres near the mouth of Thief river for the chief Moose Dung, and a like reservation of six hundred and forty acres for the chief Red Bear on the north side of Pembina river."

After citing the case of United States vs. Brooks, 10 How. 442, the court, at page 15, speaking by Mr. Justice Gray, said:

> "It is true that the treaty in question reserved the right to those persons, 'and their heirs and assigns forever.' But the like construction has since been given to reservations unaccompanied by any words of inheritance."

The court, in speaking further of titles to reservations under treaties, cited the case of Doe, Mann vs. Wilson, 23 How. 457, at page 16, said:

> "The Indian title is property, and alienable unless the treaty had prohibited its sale."

At page 21 the court's conclusions are stated in unmistakable language as follows:

> "The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, makes a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation."

It cannot be successfully urged that different rules in this respect would apply as between individuals and a tribe. It is true, that where a grant of a large area is made to a tribe in fee simple, public policy forbids its sale to any one but the government, yet this does not in any way limit the grant or title as between the United States and the tribe.

The granting words construed by the case of Jones vs. Meehan are no stronger than those under discussion in the case at bar. In fact the words, "In Order to provide a suitable farming region for the said bands there is hereby set apart for their use a tract of land," are equally, if not more positive that a present grant was intended, especially when taken into consideration the final words of the same article, "shall be received by them in part consideration for

the cession of lands made by this agreement." It must appear that the intent of the government to convey a present grant of this reservation to the Indians is more pronounced when the land granted was the absolute property of the United States from which the Indian title had long before become extinguished.

(b) The grant of the White Earth Reservation to the Indians is supported by a valuable consideration. This court, in the case of Crews vs. Burcham, 1 Black 352, 17 L. ed. 91, discussing the questions of titles to individual reservations under a treaty with the Pottawatomie tribe of Indians of October 27, 1832, said:

> "The lands reserved constituted a part of the compensation received by the Pottawatomies for the relinquishment of their right of occupancy to the government."

In the case of Jones vs. Meehan, supra, in speaking of the consideration for the cession of lands to the United States, the court said:

> "The Indians as a nation reserved no interest in the territory ceded; but, as a part of the consideration for the cession, certain individuals of the nation had conferred on them portions of the land."

The result, as laid down by the authorities, is to the effect that the cession of the Indian lands to the United States always imports a valuable consideration.

(c) The United States had the authority to convey the territory comprising the White Earth Reser-

vation to the Indians. It has been held by this court in the following cases that the United States has authority to convey its lands in such cases:

Johnson vs. McIntosh, 8 Wheat. 598, 5 L. ed. 694.

Holden vs. Joy, 17 Wall, 211, 21 L. ed. 523.

In the case of Holden vs. Joy, the court, speaking of this power of the United States with reference to the lands of the Osage Indians, said:

> "Possessed as the United States were of the fee simple title of the neutral lands, discharged of the right of occupancy by the Osage Indians, it was clearly competent for the proper authorities of the United States to convey the same to the Cherokee Nation."

(d) A patent is not necessary to pass even a complete title in fee simple. The fee simple title may be passed by the treaty itself. Jones vs. Meehan, supra. This is the rule of law. In the case of Francis vs. Francis, 203 U. S. 233, 51 L. ed. 165, this court, speaking of the description reserved under the terms of the treaty, providing authority to locate definitely thereafter by a survey, sustained the rule, which was laid down by the courts of Michigan, in the following language:

> "This authority being executed, the grant then became as valid to the particular section designated by the President as though the description had been incorporated in the treaty itself. We are, therefore, of the opinion that a fee simple passed to the reservee, Mokitchenqua, by force of the treaty itself, and that the rights of the

parties could in no wise be affected by the subsequent act of the President directing a patent to be issued."

United States vs. Brooks, 10 How. 442, 13 L. ed. 489.

Jones vs. Meehan, 175 U. S. 1, 44 L. ed. 49.

(e) Although Article 7 of the treaty of 1867 provided for allotments with restrictions upon alienation, this fact did not debase the title below a fee. It has always been conceded by the government that these original inhabitants were vested with a title, their consent to the disposition of which was always necessary before they could be divested of it. It follows that even if the title to the reservation was inalienable, yet that fact did not reduce the title which the Indians received from the government below a fee simple.

Libby vs. Clark, 118 U. S. 250, 30 L. ed. 133.

United States vs. Paine Lumber Co., 206 U. S. 467, 51 L. ed. 1139.

How much more force this reasoning has when the reservation claimed by the Indians was purchased outright from the United States.

After the treaty of 1867 had been consummated, the White Earth Reservation had become the absolute property of the Indians, subject, possibly however, to a supervision thereover by the United States under its plenary authority over the Indians.

## III.

### The Act of January 14, 1889, 25 Stat. 642.

1. The object and purpose of the act is contained in the title, "for the relief and civilization of the Chippewa Indians in the State of Minnesota." The relief was to be obtained from the proceeds of the sale of their pine and surplus lands; civilization, by securing to them allotments in severalty on the White Earth and Red Lake Reservations in conformity with the General Allotment Act, and the erection of schools for the education of the younger generation. While all of the provisions were important, those which seemed to be the most discussed by the commissioners and the Indians were the cession and allotments. This act, which had all the elements of a treaty as it had to be ratified by the Indians to give it effect, was a continuance of the general policy of the government looking to the uplifting of the Indian race, endeavoring to put them on an equal footing with the white man as rapidly as they became fitted for this important change, all of which is evidenced by numerous subsequent acts of congress on Indian legislation.

This was a compact between nations, having all the elements of a treaty, and was contractual in its nature.

Worcester vs. Georgia, 6 Pet. 515, 8 L. ed. 483.

Choat vs. Trapp, 224 U. S. 665, 56 L. ed. 941.

The court, in the case of Worcester vs. Georgia, speaking by Mr. Chief Justice Marshall on the nature of these compacts, said:

> "The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense."

There is nothing contained in this act that in any way indicates an intent on the part of congress or the Indians that the ratification thereof would lessen their title to the reservation, but was, rather, a confirmation of that title, as it provided for formal negotiations and was to be of no effect unless ratified by at least two-thirds of the male adults.

(a) The object of the census was at least twofold; to ascertain if the required number gave their assent to the act, and to ascertain the number of persons to whom allotments were to be made so that a sufficient amount of land could be reserved for that purpose.

That portion of section 1 of the act relating to the census, provides:

> "And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, and for the purpose of making the allotments and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid and before completing the same, make an accurate census of each tribe or band classifying them into male and female adults, and male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact numbers of each class."

In view of the affirmed title to this reservation in the Indians, it was intended by the United States that those Indians, parties to the ratification and their families, were then and there entitled to allotments. While the assent to the act was not, in all probability, actually signed by all of the adult males entitled to participate, the census was for the purpose of ascertaining who were to be the actual beneficiaries under the act. Otherwise there would be no necessity of classifying them into male and female adults, and male and female minors. The females and minors had no voice in the negotiations, hence the only purpose of this provision was, as to the females and minors, to show that they were equally entitled to the benefits of the act, specifically entitled to allotments, not in the event that if they were fortunate enough to be alive and in being when the agents of the government got around and actually made the allotments, but then and there upon the ratification of the act. Section 3 provides that the allotments were to be made as soon as practicable under the direction of the commissioners.

(b) There is no inconsistency in permitting an allotment after death or in the name of one deceased. To make and complete allotments under this act would naturally take some considerable time, in fact a number of years. The most natural presumption would be that some of those who were entitled to allotments would die before they could actually be made. While the act did not expressly provide that allotments should be made in the name of deceased persons who

had died between the ratification and the time the allotments were actually to be made, yet that is the only interpretation of the act, and was the construction followed by the commissioners; for the allotment in question was actually made by the commissioners in the name of Vincent La Roque in the course of the allotment proceedings that followed. The government further confirmed this allotment, for on July 21, 1902, its agents issued the patent in the name of Vincent La Roque. (R. p. 11). Nor did this confirmation stop here. The government permitted this allotment to stand affirmed for a period of six years, nine months and ten days from the issuance of the patent before it moved for its cancellation; and it may not be improper to remark in passing, and not until after this land was subject to sale under the terms of the Clapp Amendment, passed in 1906.

The government feeling that it ought to, possibly, be more explicit in its terms in framing its acts, passed the supplemental Act of July 1, 1902, 32 Stat. 641, relating to the allotments of land of the Choctows and Chicksaws commonly known as the "Atoka Agreement," in which it provided expressly for allotments in the name of deceased members. And no inconsistency was pointed out in the following decisions which had that act under construction.

Mullen vs. United States, 224 U. S. 448, 56 L. ed. 834.

Goat vs. United States, 224 U. S. 458, 56 L. ed. 841.

United States vs. Dowden, 194 Fed. 475.

In the case of Crews vs. Burcham, 1 Black. 352, 17 L. ed. 91, this court had under consideration the

treaty of October 27, 1832, with the Pottawatomie tribe of Indians. The treaty provided for a reservation to Francis Besion of one-half section of land, which was to be selected under the direction of the President of the United States after the land had been surveyed and the boundaries established according to the public surveys. Before the selection and issuance of the patent, Besion died, and this court held that the title to the land inured to his grantee. It was argued that because the land had not been selected and the patent issued before he died, he had no equity in the land which was afterwards selected and patent issued in his name. But the court, speaking by Mr. Justice Nelson, expressed the opposite view in the following language:

> "It is true that no title to the particular lands in question could vest in the reservee, or in his grantee, until the location by the President, and, perhaps, the issuing of the patent; but the obligation to make the selection as soon as the lands were surveyed, and to issue the patent is absolute and imperative, and founded upon a valuable and meritorious consideration. The lands reserved constituted a part of the compensation received by the Pottawatomies for the relinquishment of their right of occupancy to the government. The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee, or, in case he had parted with his interest, in favor of his grantees. And the obligation is not the less imperative and binding, because entered into by the government."

Doe vs. Wilson, 23 How. 457, 16 L. ed. 584.

Had Besion not conveyed, it must be conceded, his heirs would have inherited the interest in the land after selection and issuance of the patent.

These cases seem to be directly in point here. Vincent La Roque was entitled to an allotment under the terms of the Act of January 14, 1889, but before the land was allotted to him, he had died, and years after a patent was issued in his name. Under the rule laid down in these two cases, last cited, Vincent La Roque's heir would take his rights under the law of succession.

It cannot be successfully urged that a reservation to an individual is different from an allotment in this respect. The allotments were not a gratuity bestowed, but were based upon a valuable and meritorious consideration.

(c) If the government's agents failed or refused to make the allotment to the one entitled, could or ought that to militate against the beneficiary's right? In this case there is no charge of failure, refusal or neglect against anyone, for the government and its agents followed the true interpretation of the act by making the allotment, and years thereafter by issuing the patent. But had the government failed or refused to do this the beneficiaries would or could not be prejudiced by such failure or refusal.

Little vs. Arkansas, 9 How. 33, 13 L. ed. 153.

The Yosemite Valley Case, 15 Wall, 91, 21 L. ed. 82.

Smith vs. Bonifer, 132 Fed. 889.

United States vs. Dowden, 194 Fed. 475.

(d) This act should be construed in the light in which the Indians were made to understand it.

Worcester vs. Georgia, 6 Pet. 515, 8 L. ed. 483.

Jones vs. Meehan, 175 U. S. 1, 44 L. ed. 49.

Blue Jacket vs. Johnsom County, 5 Wall. 737, 18 L. ed. 667.

Choctow Nation vs. United States, 119 U. S. 1, 30 L. ed. 306.

United States vs. Kagama, 118 U. S. 375, 30 L. ed. 314.

United States vs. Winams, 198 U. S. 371, 49 L. ed. 1089.

United States vs. Choctow Nation, 179 U. S. 449, 45 L. ed. 291.

While we believe that the act itself is unambiguous, it might be well to see how this trustful and uneducated people understood its provisions as explained and interpreted to them by the commissioners who were acting for and on the part of the United States.

The relationship that has always existed between the United States and the Indians is one that requires and justifies the utmost good faith om the part of the government, since the United States is the only power to which the Indians can look to for their very existence. In the case of Jones vs. Meehan, supra, the court, speaking by Mr. Justice Gray of this relationship, said:

"The Indian tribes within the limits of the United States are not foreign nations; though distinct political communities, they are in a depend-

> ent condition; and Chief Justice Marshall's description, that 'they are in a state of pupilage,' and 'their relation to the United States resembles that of a ward to his guardian,' has become more and more appropriate as they have grown less powerful and more dependent."

The report of the negotiations by the commissioners are contained in House Ex. Doc. 247, 51st Congress, 1st session, to which we beg leave to refer on this branch of the case. Though this document is not contained or referred to in the record, yet the court may take judicial notice of such documents. New York Indians vs. United States, 170 U. S. 1, 42 L. ed. 927.

That the commissioners well understood the pronounced characteristics of the Indians is evidenced by their report to the Commissioner of Indian Affairs, wherein they said:

> "Give the Indian justice, kind and patient treatment, and his confidence can be gained, and by a wise hand he can be started on the road to a useful life. He is naturally trustful, with strong attachments for those he believes to be his friends. To his enemies and to those he distrusts, a different nature will be unmistakably visible."
>
> (House Ex. Doc. 247, supra, p. 27.)

Necessarily, the census was an important part of the act, requiring accuracy and painstaking work. Speaking of this the commissioners said:

> "In taking the census, which was a tedious work, we took unusual pains to see that all rightful persons were included, and in every case not only submitted it to the chiefs and leading persons of the tribe, but secured their presence and assistance. After having explained to them the importance of accuracy, they fully and earnestly

gave their best efforts to insure its correctness." (Ib. p. 26).

At the first council held at Red Lake, Bishop Marty of the commission, speaking of the act, said:

"As for my part, I can only say that I would not have come here to present this bill to you if I was not convinced that it was the very best thing that you can do for yourselves and *for your children*. I know that the Great Spirit would punish me if I would ever say or do anything which would not be for the benefit of the Chippewas. It is time that something should be done to improve your condition, which is getting worse from year to year. You are here surrounded by your lands, which are rich and full of good things, but you cannot make use of them. You are just like the man would be on the shore of that lake. The lake is full of good fish, but he has no hook and no net, and has nothing to take the fish out with, so he starves for want of something to eat. So the Great Council invites you now to dispose of those lands which you do not need, the proceeds from those lands to be used to improve the other lands which you will keep, so as to make a good use of them. This bill is like the net or the fish-hook to take the fish out, so the Indians will have plenty and be well off. As it is, your pine lands are burning; a great many pines are stolen; your property is getting less all the time, and you have no benefit from it at all. But we have been appointed to help you select the very best lands on the reservation for yourselves to keep forever. We must see to it that every one of you gets a good home, and when the lands which you have no use for have been sold that money will be used to give you houses and farming implements and schools, and to make you a happy and prosperous people." (Ib. p. 68).

At the third council at Red Lake, Bishop Marty again speaking, said:

> "The first thing—now I want you to pay attention—the first thing is that you are to choose for yourselves the best lands you can avail yourselves of, and you are not obliged to go on those lands at once; you can remain where you are, and those lands will be written down for you under your name, and they will belong to you and *your children forever.*" (Ib. p. 71).

At the same council meeting Bishop Marty, answering an inquiry by one of the Indians, said:

> "That is what the Government wants. You are to have as much land as you can use, you and *your children.*"

At the third council at Red Lake, May-dway-gon-on-ind, a member of the Red Lake band, relying implicity upon the words of the commissioners, as he of right had no reason to do otherwise, speaking of that confidence he placed in their utterances, said in part:

> "You certainly will not tell anything but the facts, because we are under the guidance of one Spirit, and certainly the law-makers who are near our Great Father, and our Great Father himself, certainly cannot make up their minds to misrepresent things to us.
>
> "My friends, I accept all your propositions. You especially as chairman (looking towards Mr. Rice), I address you. I accept the propositions you have made me. My friends, you stand in the same light—the bishop and our other friend there—we know that you do not misrepresent what you say to us here.
>
> "We wish to guaranty to our posterity some security; that is why we demand the reservation we have outlined on that paper. It is not greediness that influences us. This tribe is growing

year by year, and we think it is our duty to protect those who come after us. We want the reservation we now select to last ourselves and *our children forever.* I shall touch the pen with the understanding that all you have said to us is the truth; that you respect the truth and the words of our Great Father. And in the meantime we want you to remember the occasion that has made us stand here, pleading for the future." (Ib. p. 83).

At the first council held at White Earth on July 17, 1889, Mr. Rice, speaking directly on the question of allotments, said:

"Under the present act, as soon as these negotiations shall have received the approval of the President, we are authorized to give to every man, woman, *and child 160* acres of land as an allotment, and in case of the death of any person who has received such an allotment, the land passes to his or her legal representatives.

"We can see how discouraging it must have been heretofore for anyone to secure an allotment; *death might intervene* and the land and its improvements be lost; very few had the means, if the disposition, to put even ten a[illegible] under cultivation." (Ib. p. 87, 88).

At the third council at White Ea[illegible] shop Marty speaking in regard to the allotments under the act as compared to the quantity of lands to be allotted under a former act, said:

"Congress is in the position of a man with an old house; he don't like to spend money on it, but if Congress sees that you are willing to start a new foundation they will send you the money. Congress would, however, be astonished if, after signing the treaty of three years ago, which was very much less favorable to you than this, you would decline to accept this one. By the former

> treaty you would receive only 160 acres per head of family, and the balance of you 80 or 40 acres each, but under this act every man, woman *and child* gets 160 acres. Would you take less when more is offered?" (Ib. p. 91).

The commissioners were certainly using their best endeavors to obtain the assent of the Indians, impressing upon them the advantages to be derived under the act, as well as the disadvantages that would likely result from their rejection of it; all of which, it must be conceded, was strictly within the meaning of the act and the circumstances of the Indians. In placing these matters before the Indians, Bishop Marty, at the third council held at White Earth, said:

> "You must remember that the Government considers you its wards, and that you will remain such until this act is brought into operation, when you will become citizens, elect your representative to go to Congress and stand the equal of them all, demanding your rights if necessary. But if these propositions are thrown back in the face of Congress, years will pass, your pine will be burned, and many will die of starvation. An old woman told me this morning that since the snow left the ground she had had to dig snake-root, which was all she had to live upon." (Ib. p. 93).

At the same page, Bishop Marty, again referring to the allotments, said:

> "It is a compliment, as it indicates the Indian comes to maturity sooner than a white man. Every one gets 160 acres, *even the little child*, and that is not the case among the whites." (Ib. p. 93).

The question of reserving enough land in the White Earth Reservation to make the allotments was being discussed, and Bishop Marty said:

"He says that the Indians will be censured if there is not land enough; we will be censured, because in our instructions we read that we must keep land enough for all, and we are going to fulfill that duty. 'While it is necessary to exercise great care to reserve a sufficient area of land to make the required allotments, it is no less necessary that great care and caution should be exercised to see that the portion reserved for that purpose will be sufficient to make to each of the Indians an allotment of such land as will be advantageous for agricultural and grazing purposes.' This commission will not have done its work until every Indian is provided with land." (Ib. 102, 103).

At the seventh council held at White Earth, Mr. Rice, speaking on the allotment and its advantages, said:

"We go out on the prairies and see a large extent of territory unoccupied and ask, 'Who owns this?' and the answer is, 'No one.' We look at the records and find it is true. Now, when you have taken allotments you know as well as we do that no earthly power can take them from you.

"You wonder why the white men are rich, and I will give you one reason. They are under the protection of the laws, so that when the head of the family dies the property goes to the children; when the *children die it goes to the family.* As you are living now, when one dies without having taken an allotment there is so much thrown away; while under the proposed arrangement the property of deceased persons will go to the family. It is that system among the whites which has enabled them to build railroads, ships and palaces. Twenty-two years ago, when you acquired this reservation, if the laws had been extended over you, you would have been in a very different

position today. Now, your decision should not depend on the disposition made of a few pine trees or of a few acres of prairie or swamp, but you should remember that this arrangement will give you the same status as the white man." (Ib. p. 104).

At page 106 of the report, Mr. Rice, again speaking of the allotments, said:

"Our duty under instructions is to allot to each individual, each man, woman, *and child,* 160 acres, *with good title,* so that when one dies after having taken such an allotment the property will go to the family."

Speaking of the census, Mr. Rice, at page 109 of the report, said:

"After we get through we will have to take a census, and we wish as many of you as possible to be present so you can see there is no mistake made * * * This is the most important census ever taken, and it will require some days to get through with it."

Again, at page 118 of the report, the census was adverted to by Mr. Rice, who said:

"We must meet again as soon as we can to look over the rolls and see that they are correct." * * *

"If there are any names on this roll which should not be there, please let us know, and if there are any names which should be and are not, please inform us, so that the roll may be corrected."

The report at the same page continues:

"The census rolls were then carefully read over to the Indians present at the council, which was largely attended.

"Mr. Rice 'The census rolls have been carefully read to you and corrected, and we wish to

know whether as so corrected they are satisfactory to you.'

"To this question the Indians responded, 'Yes,' and all expressed themselves as perfectly satisfied."

On page 34 of this report, at line numbered 37 is found the name of Henry La Roque, this appellant, showing that he was one who signed the agreement on the part of the Indians.

The foregoing quotations are but a few of similar statements of the commissioners contained throughout their report. It is plain that the Indians were impressed with the fact that they were under the care and protection of the government; and under all of the circumstances surrounding the negotiations they had a right to expect that they would receive all that was promised them, realizing that they were not on an equal footing with the government, but were obliged to rely implicitly on the promises made to them. In the case of Choctaw Nation vs. United States, 119 U. S. 1, 30 L. ed. 306, the court, speaking by Mr. Justice Matthews on the question of relationship between the United States and Indians, said:

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that

inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

"The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumption of fact and of right which they presuppose, the acts and conduct of the parties under them, which constitute the material for settling the controversies which have arisen under them."

In the case of the United States vs. Kagama, 118 U. S. 375, 30 L. ed. 314, the court, speaking by Mr. Justice Miller on the same matter, said:

"These Indian tribes are wards of the Nation. They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen."

In the case of Choat vs. Trapp, 224 U. S. 665, 56 L. ed. 941, this court, speaking by Mr. Justice Lamar on the construction to be placed on the government's dealings with the Indians, said:

> "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years.
>
> "For example, in Kansas Indians (Blue Jacket vs. Johnson County) 5 Wall. 737, 760, 18 L. ed. 667, 674, the question was whether a statute prohibiting levy and sale of Indian lands prevented a sale of state taxes. The rule of strict construction would have compelled a holding that the property was liable. But Justice Davis, in speaking for the court, said that 'enlarged rules of construction are adopted in reference to Indian treaties.' He quoted from Chief Justice Marshall, who said that 'the language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptable of a more extended meaning.' Again, in Jones vs. Meehan, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1, it was held that 'Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.' In view of the universality of this rule, Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor in determining the rights granted to the Choctows and Chickasaws."

2. The effect of the allotment is fully expressed in section 5 of the Act of February 8, 1887, 24 Stat. 388.

Section 3 of the Act of January 14, 1889, providing, as it does, that the allotments shall be in conformity with the Act of 1887, this latter act is the one which necessarily governs the effect of the allotment, section 5 of which provides:

> "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period.
>
> "And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void:
>
> "*Provided,* That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the

laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act."

Any amendments which may have been made to or touching this section would have no bearing, because the Act of January 14, 1889, providing for these allotments, adopted the provisions, as to allotments, of the act of 1887 as it then stood, and a repeal or an amendment of the earlier statute would not affect the later act. (36 Land Decisions, 210.)

Under the treaties the least right the Indians had to the lands was that of occupancy, so it must have been intended by congress, through allotments, to give them something more substantial than mere occupancy. They were to be given instruments termed "patents," which "shall be of the legal effect." In view of the fact that the lands to be allotted were those of the Indians, it does not seem that there is much room left for construction. The term, "patent," when used in connection with land matters, has an ordinary, well defined meaning. It carries the presumption of verity, and always imports the vesting of a title of some nature in the patentee; especially should this be so when it is stipulated in the act that they "shall be of the legal effect." The term, "legal effect," which was to be given to the patents, must have been placed in the law for some decided purpose. If so, what was the purpose? Was it merely for the purpose of placing in the Indian's hands a paper having the appearance of a valuable document with the seal of the General Land Office stamped thereon, and, (if the court may take judicial notice of these instruments which

were actually issued) with the name of the President of the United States written thereon, over which he had "*caused these Letters to made Patent,*" and which the government might, at pleasure, cancel at any time within the twenty-five years, and all the promises made to the Indians held for naught? The government of these United States is "made of sterner stuff," and it was not intended by its congress to give these people a worthless piece of paper under the pretext that it was a valuable land document. All of the inferences of the act are to the contrary. In the case of the death of the allottee the land shall descend to his heirs according to the laws of the State or Territory where the land is located, has a great deal of significance. The interest in the allotment was to be a descendable interest. Goat vs. United States, 224 U. S. 458, 56 L. ed. 841. It was intended by congress that an estate of inheritance was to be created, and not a mere right of occupancy in the allottee. The phrase, "to him and his heirs," creates a fee simple estate. True, restrictions upon alienation were imposed, but they are not inconsistent with a fee simple title.

Libby vs. Clark, 118 U. S. 250, 30 L. ed. 133.

United States vs. Paine Lumber Co., 206 U. S. 467, 51 L. ed. 1139.

In the case of Smith vs. Bonifer, supra, the court construed the act providing for allotments on the Umatilla Indian Reservation in the State of Oregon. The act there under consideration is practically identical with section 5 of the Act of 1887. In speaking of the right of the allottee and heir under the allotment and patent, the court said:

"The right of succession in the heir is not created by the patent. The patent is a mere declaration of trust, in which the intention that the heir shall take in the right of the allottee is shown. When a selection has been made and the right to an allotment has attached, the act of the allotting commissioners in wrongfully allotting the lands to another cannot operate to cut off the heir of the person entitled to the allotment. The right of the heir depends, not upon what was done by the allotting department, but upon what ought to have been done."

(a) The law of descent of the State of Minnesota must apply to this allotment. The allotment having been properly made by virtue of the title of the White Earth Reservation in the Indians and under the terms of the Nelson Act, an estate of inheritance was created, and the interest in the allotment was descendable. Goat vs. United States, 224 U. S. 458, 56 L. ed. 841. The last proviso in the above quotation of section 5 says that the laws of descent of the State where the land is located shall apply after patents therefor have been executed and delivered. This means the first patent and not the final patent. It was not necessary to provide for this after final patent, because when that would be issued the land would be divested of the trust, and by operation of law the interest in the land would descend according to the laws of the State. And then, as was said in the case of Re Heff, 197 U. S. 488, 49 L. ed. 848:

"It is hardly to be supposed that Congress would legislate twenty-five years in advance in respect to the general status of the Indians. If they were to continue in the same relation to the

government that they hitherto occupied, it would seem as though Congress would have said nothing and waited until near the expiration of twenty-five years before determining what should be such status."

This reasoning must apply equally to the descent of property, as to citizenship, as the usual fee simple estate was being created by the act, except restrictions upon alienation were imposed, which were in no way inconsistent with the estate thus created.

In the case of United States vs. Park Land Co., 188 Fed. 383, the then United States Circuit Court for the District of Minnesota, having under consideration these questions pertaining to the White Earth Reservation, said:

"Now, in the general allotment act, after prescribing the method of making the allotments, and how the title should be held, that is, under the trust patents, with the restrictions upon alienation provided for in the Act, Congress provided, 'that the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto,'—that is, to these allotments—'after patents therefore have been executed and delivered, except as herein otherwise provided.' I do not understand there is any dispute as to Mr. Powell being correct when he says there is nothing 'otherwise provided.' So that the law of descent and partition in force in the State of Minnesota applies to these White Earth allotments after patents therefor—after these trust patents therefor—have been executed and delivered. Beam vs. United States, 162 Fed., 260 * * * And the only way that I know of that we can ascertain who his heirs are and what portion of the allotment those heirs are respectively entitled to, would be by proceedings in the Pro-

bate Court. So, if seems to me to be competent for the Probate Court of Becker County, where this reservation is, in case of the death of the allottee, whether full-blood or mixed-blood, to ascertain and declare who his heirs are and in what proportion they inherit his allotment. I think it is an inheritable estate, governed by the law of descent and partition in the State of Minnesota."

In the case of Beam vs. United States, 162 Fed. 260, cited by the court in the Park Land Co. case, supra, said:

"It is true that by the statute of 1887 the time for issuing the final patent may be deferred, and in fact may never arrive; but in the meantime it is clear that the allottee takes, under the first so-called patent, an estate in the land allotted to him. He is given absolutely the sole and exclusive use and benefit of the land. Such a right acquired under the statute would, if the statute were silent on the subject of inheritance, descend, upon the death of the grantee, to his heirs. The Indian tribes had their own rules and customs governing the descent of land (Brown vs. Steele, 23 Kan. 672; Jones vs. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. ed. 49), and it must have been for the purpose of removing all doubt as to the succession, and establishing the more equitable rules of descent and distribution adopted by State laws, that the provision was inserted that the so-called first patents should declare the trust for the benefit of the allottee, 'or, in case of his death, or his heirs according to the laws of the State of Territory where such land is located.'

"If this were the whole expression of the intention of Congress in regard to the inheritance of such an estate, there might be plausible ground for the argument that the words so used were words of purchase, and not of inheritance, or, in

other words, that the intention was to name the heirs as cestuis que trustent, who would immediately succeed to the right of the allottee in case of his or her death, before the issuance of the final patent. But other language of the act expressive of the intention of Congress is to be found in the final proviso:

" 'That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents shall have been executed and delivered, except as herein otherwise provided.'

"The appellant contends that this proviso refers to the descent of the land after the issuance of final patent, and does not effect its disposition prior to that time. But the proviso is in its terms inclusive enough to refer to both patents, and from its position in the text, following directly after and connected with the provision declaring null and void all conveyances of the allotted land before the issuance of the final patent, it is evident that its purpose is to regulate the disposition of the property upon the death of an allottee before the issuance of the final patent. It is not to be supposed that Congress, after providing for the issuance of the final patent in fee, discharged of the trust and of all charge or incumbrance, would consider it necessary to attach thereto the proviso that the descent of such property and partition thereof should be goverened by the laws of the State, because such laws would, of their own force, attach from the time when the fee vested in the grantee. That proviso, therefore, as we construe the statute, applies to the descent of the property during the time it is held in trust by the United States, and by its terms the descent of property here in controversy, on the death of the allottee, is to be governed by the law of Ore-

gon. * * * In brief, the Act of Congress, as we construe it, leaves the whole disposition of the land, in case of the death of the allottee before final patent, to be governed by the state law.

"In the case of an Indian allottee there is a present grant from the time of the issuance of the first patent—an absolute grant of an estate in trust for the allottee, subject to no conditions to be complied with upon his part. The Indians were not donees of the government, and the allotment was not made as a mere act of its bounty. It was an act of partition in severalty to individual Indians of lands the title to which the United States then and for many years had held in trust for the tribe. It was an act which went into effect only upon the assent of the Indians. It was the expression of the more recent policy of the government, the purpose of which is to dissolve the tribal relation, establish the Indians in individual homes, in the possession of individual estates, ultimately to be vested in them in fee, to confer upon them the rights and impose upon them the duties of citizenship, and to make their tenure of real estate in all respects subject to the local laws."

In speaking of the word "allotted," Mr. Justice M'Lean, in his concurring opinion in the case of Worcester vs. Georgia, 6 Pet. 515, (582), said:

"To contend that the word 'allotted,' in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties."

However, in any event, the patent under consideration in the case at bar, became a final patent in ef-

fect upon the passage of the Clapp Amendment. 36 Land Decisions, 210.

(b) The law of descent in force in the State of Minnesota in 1902, when the patent was issued, provided:

> "If the intestate leave no issue nor husband or wife his estate shall descend to his father."
>
> Sub. 3, Sec. 4471, Statutes of Minnesota for 1894.

It necessarily follows, that after the issuance of the patent in 1902, this appellant, as the heir of Vincent La Roque, was, as against the tribe, and as against the right of the United States to cancel the allotment, the owner of the land.

(c) On May 8, 1906, congress amended section 6 of the Act of February 8, 1887, by giving the Secretary of the Interior jurisdiction to cancel the allotment of any Indian who dies before the expiration of the trust period, to ascertain the legal heirs of such Indian and issue fee simple patents to said heirs or sell the land for their benefit, and providing that the action of the Secretary in determining the heirs shall be conclusive and final. (34 Stat. 180.)

The question as to whether this amendment, known as the Burke Act, applied to the allotments of the White Earth Reservation, was before the Secretary of the Interior for decision in 1907. The Secretary held that the Burke Act did not apply to these allotments and patents.

36 Land Decisions, 210.

Vachon v. Nichols-Chisolm Lbr. Co. 126 Minn. 303, 148 N. W. 288.

IV.

The Statute of Limitations is a bar to the right of action by the United States herein.

1. The appellant relies upon the statute of limitations, Act of March 3, 1891, 26 Stat. 1099, Sec. 8, as a bar to the right of action by the United States herein. This act provides:

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

The patent in this case was issued on July 21, 1902 (R. p. 11), and the complainant's bill was filed on May 1, 1909, (R. p. 4,) six years, nine months and ten days after the issuance of said patent.

The Circuit Court of Appeals, relying upon the court's expression in the case of United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, held that this instrument was not a "patent" within the meaning of the statute. (R. pp. 20, 21.)

(a) The court in the case of United States vs. Rickert, supra, had under consideration the question as to the right of the State to tax improvements upon the allotments of the Indians, and in that connection discussed the restricted title which the Indian held, hold-

ing that under such title the United States had the power, and in fact was compelled, to protect the property from any lien or incumbrance; but the court's expression, insofar as it implies that these instruments are not "patents" for the purpose of conveying restricted inalienable titles from the government to the Indian allottees, *is dictum,* lacking the force of a judicial determination, and is not controlling in this case. It appears to us that the court was not called upon to decide the literal title and effect of the patent as between the United States and the Indians.

McCormick Har. Machine Co. v. C. Aultman Co., 169 U. S. 606, 42 L. ed 875.
Harriman v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739.

In the case of Choat v. Trapp, 224 U. S. 665, 56 L. ed. 941, the court was considering the tax exemption on allotments in Oklahoma, and in effect receded from the expression in the Rickert case, that these instruments were improperly termed "patents" by congress. Mr. Justice Lamar, speaking for the court, said:

> "The record contains no copy of any patents under which the plaintiffs hold. But the act provided that they should be framed in conformity with the Atoka agreement. Those who signed the patent could not convey more rights than were granted by that part of the Curtis act, nor could they, by omission, deprive the patentee of any exemption to which he was thereby entitled. The patent and the legislation of Congress must be construed together, and when so construed, they show that Congress, in consideration of the Indians' relinquishment of all claim to the common property, and for other satisfactory reasons,

made a grant of land which should be non-taxable for a limited period. The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. Under the provisions of the 5th Amendment there was no more power to deprive him of the exemption than of any other right in the property. No statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres, or 50 acres, or the timber growing on the land."

(b) Section 5 of the Act of February 8, 1887, defines this instrument to be a "patent" of "the legal effect." Congress used the term "patent" in this act for some specified reason. It must have been used in its ordinary sense. Congress was legislating on property rights. It had a well defined policy which it was endeavoring to establish. Theretofore the great majority of the Indians had held their lands in common as a tribe. There was no individual ownership, and as long years of experience had demonstrated, the Indians, as a whole, were making very little progress towards civilization and a condition which would render them self-supporting. It was evident that the continuance of their tribal relationship was becoming more of a detriment as they became more closely surrounded by a white population, and congress, ever anxious to better the condition of these people, inaugurated the general policy of placing them in individual homes, investing them with individual ownership of their lands. It was intended that they should own their own farms, and they were to be given patents therefor which should be of legal

effect. But congress deeming it the best policy not to permit them to dispose of these individual holdings, imposed restrictions upon alienation for a specified time, at the termination of which another conveyance was to be given them which would do away with the restrictions or trust theretofore imposed. Now, as between the United States and the Indian there was a complete title. The United States could not arbitrarily take these allotments away from them. The Indian had a vested right, and vested rights under the law are sacred. Congress was, therefore, creating an estate in the allottee and his heirs; and in doing so what has always been the custom of Congress in providing for the conveyance of such titles? It has most always been by an instrument termed a "patent." In this instance Congress used this word advisedly, giving the Indian a complete title, but merely for self-preservation of the Indian, restrictions upon alienation were imposed; and restrictions upon alienation are not inconsistent with a fee title. Libby v. Clark, 118 U. S. 250, 30 L. ed. 133.

The court, in the case of La Clair v. United States, 184 Fed. 128, passing directly upon the statute of limitations in connection with these identical patents, held that they came within the statute. The court said: It "must be held to apply because the United States is not 'proceeding simply to assert its own rights and recover its own property.'" The court, after explaining the act of April 23, 1904, 33 Stat. 297, again said: "In this view, the contest being adversary, the parties at arms' length, so to speak, the relation of guardian and ward having been transformed into that of sovereign and citizen and

there being no express authority of law which authorizes the Secretary to deal with such cases, in its cross-bill the United States is in the attitude of prosecuting suits against citizens for cancellation of patents beyond the time when it may wage controversies in that behalf." The land in question, if the patent is cancelled, will not become the property of the United States but will be the property of the tribe until it is again allotted to some other person.

(c) Congress has repeatedly designated these instruments as "patents." In the Act of June 15, 1880, 21- Stat. 199, ratifying an agreement with the Ute Indians in Colorado, Congress designated similar instruments as "patents." The first condition of the agreement provides:

> "FIRST. That the Government of the United States cause the lands so set apart to be properly surveyed and to be divided among the said Indians in severalty in the proportion hereinbefore mentioned, and to issue patents in fee simple to them respectively therefore, so soon as the necessary laws are passed by Congress. The title to be acquired by the Indians shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance of the grantee or by the judgment, order, or decree of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President of the United States may see fit to remove the restriction, which shall be incorporated in the patents when issued, and any contract made prior to the removal of such restriction shall be void."

Here is an act of congress designating these instruments "fee simple patents," and in the General Allotment Act congress used the term in the same sense, and has invariably expressed its intent practically in the same language where it has provided for Indian allotments.

(d) This court has termed these instruments "patents" in many of its decisions where it had this document under discussion. In the case of Re Heff, supra, this court, speaking by Mr. Justice Brewer, said:

> "Now the allotting and the patenting are joined together as though occurring at or near the same time. Further, when the first patent is issued the recipient ceases to be an allottee, and becomes a patentee. Again, the second patent does not always go to the holder of the first patent, because, as provided by Sec. 5, it may go to the first patentee or his heirs."

In the case of Mullen v. United States, 224 U. S. 448, 56 L. ed. 834, the court, speaking by Mr. Justice Hughes, said:

> "It does not appear from the allegations of the bill whether patents for the lands had been issued to the Indian grantors before the conveyances were made. But as the lands had been duly allotted, the right to patent was established."

(e) While it may not be important to the issues in this case, it may not be out of place to note that the complainant, in its bill of complaint, designates this instrument a "patent." (R. pp. 2, 3.)

2. The Clapp Amendment of June 21, 1906, 34 Stat. 325, expressly provides that "the trust deeds" (meaning these trust patents) "*heretofore* or hereafter executed by the Department for such allotments are *hereby* declared to pass the title in fee simple." This act made these instruments final patents without the necessity of issuing actual fee simple patents in form, unless the allottee should desire one. It logically follows that when these patents are shorn of the trust provision they come within the statute of limitations, because the United States has divested itself of all claims or interest in the property.

36 Land Decisions, 210.

In this decision, the Secretary of the Interior, speaking of the Clapp Amendment and the amendment thereof, said:

> "These acts operate to pass fee simple title to adult mixed-blood Indians on White Earth Reservation to whom trust patents or deeds were theretofore or might thereafter be issued."

(a) The commissioners having properly allotted the land in question to Vincent La Roque under the Nelson Act, an inheritable estate was created, and a vested right attached which could not be disturbed unless there is some positive act of congress authorizing it; and even if there were such an act of congress it would be unconstitutional, because it would be within the constitutional prohibition of depriving one of his property without due process of law, and an arbitrary act of congress in this respect is not such due process of law. Therefore, upon the issuance of this patent in 1902, this appellant, admittedly an

adult mixed-blood Indian (R. pp. 2, 10), held this land in fee simple absolute upon the approval of the Clapp Amendment.

United States v. Park Land Co., 188 Fed. 383.

Beam v. United States, 162 Fed. 260.

(b) There being no fraud charged, and land patents issued by the government carry the presumption of verity, could the government reach this patent no matter into whose hands it might be transferred? In view of the Clapp Amendment, had the appellant transferred the land would not his grantee have become an innocent purchaser? It would seem that this ought to be true, and if true it would be because this instrument carries verity and is within the statute of limitations.

(c) Congress, by section 8 of the Act of March 3, 1891, has barred the United States from bringing actions to cancel patents unless the actions are brought within certain times. This statute of repose may have been intended for the benefit of the white man only, notwithstanding the Indian was the first possessor of the entire continent. If this is so it is because congress has this power. But this inference must be set at naught when we find that congress has also passed a law making Indians subject to the statute of limitations. Act of May 31, 1902, ch. 946, 32 Stat. 284. This Act provides:

"That in all actions brought in any State court or United States court by any patentee, his

heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians."

But congress did not intend to be partial in these matters, because in the Act of March 3, 1891, there are no exceptions whatever contained therein, and there seems to be no other logical conclusion than that the statute applies to Indian patents as well as others and is a complete bar to the right of action by the United States herein.

3. This court has repeatedly upheld the statutes of limitations:

"Statutes of limitation are rules of property, favored in law and vital to the welfare of society. They promote repose by giving security and stability to human affairs."

Wood v. Carpenter, 101 U. S. 135.

"Statutes of limitation are statutes of repose, and should not be evaded by a forced construction."

United States v. Hodge, 13 How. 478.

"The statute of limitations is entitled to the

same respect as other statutes, and ought not to be explained away."

Celmentson v. Williams, 8 Cranch. 72.

"Statutes of limitation are entitled to favorable construction, since they rest on sound policy, and tend to the peace and welfare of society."

M'Cluny v. Silliman, 3 Pet. 270.

"Exceptions to the operation of the statute of limitations are not favored."

Richards v. Maryland Ins. Co., 8 Cranch 84.

"Courts of equity are no more exempt from obedience to statutes of limitation than courts of law."

Bank of United States v. Daniel, 12 Pet. 32.

"A statute of limitations may be set up in defense in equity as well as at law."

Lewis v. Marshal, 5 Pet. 470.

"Courts of equity give effect to the statute of limitations, as a defense to an equitable right, when, at law, it would have been properly pleaded as a bar to a legal right."

Curtner v. United States, 149 U. S. 662.

V.

A patent is not void because issued after the patentee's death.

Sec. 2448, Rev. Stat. U. S. 1878.

1. The Circuit Court of Appeals was of the opinion that such a patent is void. (R. p. 19.) Section 2448, supra, provides:

"Where patents for public lands have been or may be issued, in pursuance of any law of the

United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased patentee as if the patent had been issued to the deceased person during life."

This section of the Revised Statutes is taken from the Act of May 20, 1836, ch. 76, 5 Stat. 31.

However, independent of this section of the law, the courts have always held that the title to the land designated in the patent, issued in the name of an Indian reservee or allottee after his death, inured to his heirs, devisees or assigns.

Doe v. Wilson, 23 How. 457, 16 L. ed. 584.

Elwood v. Flannigan, 104 U. S. 562, 26 L. ed. 842.

Vachon v. Nichols-Chisolm Lbr. Co. 126 Minn. 303, 148 N. W. 288.

(a) Yet, this court has held positively that this law, embodied in section 2448, supra, applies to Indian lands.

Crews v. Burcham, 1 Black. 352, 17 L. ed. 91.

In this case just cited, Mr. Justice Nelson, speaking for the court, after quoting the Act of May 20, 1836, 5 Stat. 31, said:

"We think it quite clear, if this patent had issued to Besion in his lifetime, the title would have inured to his grantee. The deed to Armstrong recites the reservation to the grantee of the half section under the Treaty, and that it was

to be located by the President after the lands were surveyed; and then, for a valuable consideration, the grantee conveys with a full covenant of warranty. The land is sufficiently indentified, to which Besion had the equitable title which was the subject of the grant, to give operation and effect to this covenant on the issuing of the patent within the meaning of this Act of Congress. The Act declares that the land shall inure to, and become vested in, the assignee, the same as if the patent had issued to the deceased in his lifetime."

Although this statute of May 20, 1836, expressly provides for patents to public lands, yet it is seen that this court has applied this law to Indian lands also, because congress intended the law to apply to all patents issued by the national government. But the statute of limitations, section 8, supra, does not limit the right of action to any particular lands or patents, but to "*any patent hereafter issued.*" The Circuit Court of Appeals said the Act of March 3, 1891, treated of a variety of subjects connected with the public lands (R. p. 20) and the court inferred that because section 8 does not expressly mention Indian lands or patents, this law should not apply thereto. This court, in its many decisions on Indian matters, has invariably applied the general rules of construction governing titles to public lands.

In the case of Ballinger v. United States, 216 U. S. 240, 54 L. ed. 464, involving the right of an Indian allottee to one of these patents, this court made numerous quotations from its former decisions which dealt with the issuance of patents to public lands. No distinction was made between public and Indian lands.

## VI.

## The Act of April 23, 1904, 33 Stat. 297.

1. This act gave the Secretary of the Interior jurisdiction to cancel patents in certain specified cases during the time that the United States held the title to the land in trust: Where a double allotment is made to any Indian under an assumed name or otherwise, or where a mistake has been made in the description of the land inserted in the patent.

These are the only two grounds on which the Secretary can cancel these patents. Outside of these two grounds no such patents shall be subject to cancellation without authority of Congress. This act in itself limits and bars the United States from bringing this action without the special authority of Congress, and Congress has not authorized its cancellation.

(a) The cause for cancellation of the patent in the case at bar is not one of those enumerated in the Act of April 23, 1904, supra, so the Secretary would be without jurisdiction to cancel this instrument, and the only way it can be cancelled is by direct authority of congress, and congress has not so authorized. The court, in the case of La Clair v. United States, 184 Fed. 129 (137), expressed this view of the question.

## CONCLUSION.

The lands comprising the White Earth Reser-

vation were those of the Indians, and were, according to the Act of January 14, 1889, to be partitioned and allotted among them. Upon the ratification of this act by the Indians, they and their children were then and there entitled to allotments. The act of February 8, 1887, providing for allotments, created inheritable estates, descendable according to the laws of the State where the allotment was situate, and the estates thus created were to be evidenced by patents of the legal effect. To now contend, that because the contingency of death intervened between the ratification of the Act and the making of the allotment, would defeat the rights of this appellant, the descendant of a race of people at one time the possessors of the entire continent, "would do injustice to the understanding of the parties."

In view of the superior equities that appear in this case, the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

J. T. VAN METRE,

Solicitor for the Appellant.

August, 1915.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1915.

HENRY LA ROQUE, APPELLANT,
*v.*
THE UNITED STATES.
No. 240.

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

## BRIEF FOR THE UNITED STATES.

(The opinion of the Circuit Court of Appeals will be found in the record at p. 18 and in 198 Fed., 645.)

### STATEMENT.

The object of this suit was to quiet title to a parcel of land in the White Earth Indian Reservation, Minnesota, which had been erroneously allotted in the name of one Vincent La Roque, a deceased child of the appellant, under the so-called Nelson Act of January 14, 1889 (ch. 24, 25 Stat., 642). The case was tried and determined upon an agreed statement of facts (R., 10). The Nelson Act provided a plan for bringing about a cession and relinquishment by the Chippewa Indians of Minnesota of all their

right and interest in their reservations situate in that State save only so much of the White Earth and Red Lake Reservations as, in the judgment of the commission conducting the negotiations, would be necessary "to make and fill the allotments required by this and existing acts." The lands ceded were to be sold in ways defined by sections 4 to 6 of the act, and the moneys resulting, after deducting the expenses, were "to be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per cent per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made" (sec. 7). It was further provided (ib.) that, with certain exceptions not now material to be stated, the interest during the fifty-year period should be paid one-half annually "in equal shares to the heads of families and guardians of orphan minors for their use," and one-fourth annually "in equal shares per capita to all other classes of said Indians," and one-fourth for the establishment and maintenance of a free school system under the direction of the Secretary of the Interior. At the expiration of the fifty years the permanent fund was to be divided and paid "to all of said Chippewa Indians and their issue then living, in cash, in equal shares" (ib.).

Section 1 directed the appointment of three commissioners and required them to negotiate with the

Indians, and further provided that the cession and relinquishment should "be deemed sufficient as to each of said several reservations, except as to the Red Lake Reservation, if made and assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations," and as to the Red Lake Reservation, if assented to in like manner "by two-thirds of the male adults of all the Chippewa Indians in Minnesota," but should not become effective until approved by the President. It contains this additional matter:

> And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, and for the purpose of making the allotments and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid, and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults and male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact numbers of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the Interior and the other with the official head of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall be deemed full and ample proof of the assent of the Indians and shall

operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

The provisions for the making of allotments are all contained in the third section, which is as follows:

That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: *Provided, however,* That the amount

heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: *Provided further,* That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

The first section of the General Allotment Act of February 8, 1887 (24 Stat., 388), is as follows:

That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provision of this act: *And provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further,* That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

This was amended by the act of February 28, 1891 (26 Stat., 794, sec. 1), to read:

That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for

their use, either by treaty stipulation or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation, or any part thereof, of such Indians is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot to each Indian located thereon one-eighth of a section of land: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual in quantity as above provided the land in such reservation or reservations shall be allotted to each individual pro rata, as near as may be, according to legal subdivisions: *Provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty to certain classes in quantity in excess of that herein provided the President, in making allotments upon such reservation, shall allot the land to each individual Indian of said classes belonging thereon in quantity as specified in such treaty or act, and to other Indians belonging thereon in quantity as herein provided: *Provided further,* That where existing agreements or laws provide for allotments in accordance with the provisions of said act of February 8, 1887, or in quantities substantially as therein provided, allotments may be made in quantity as specified in this

act, with the consent of the Indians, expressed in such manner as the President, in his discretion, may require: *And provided further,* That when the lands allotted, or any legal subdivision thereof, are only valuable for grazing purposes, such lands shall be allotted in double quantities.

The second section of the General Allotment Act is as follows:

That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided,* That if anyone entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection

shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

The agreed statement (R., 10) shows that Vincent La Roque was born before the approval of the Nelson Act, viz., in 1883; that his name appears upon the census rolls made pursuant to that act; that *after his death* an application was made and filed in his name for the allotment in question; that thereafter, on July 21, 1902, a trust patent was issued in his name, and that Henry La Roque, the appellant, now claims the land as sole heir at law in virtue of the allotment and trust patent.

The questions presented are:

1. Was there any authority for the allotment and trust patent?

2. Is the suit barred by the statute of limitations?

3. Is the court's jurisdiction ousted by the act of April 23, 1904?

## ARGUMENT.

### I.

**The allotment and trust patent were unauthorized.**

1. *The authority, if it exists, must be found in the Nelson Act; there was none in the treaties which preceded it.*

Much is said in the appellant's brief concerning the effect of treaties, particularly the treaty of April 18, 1867 (16 Stat., 719), which established the White Earth Reservation. Counsel assert that

by this the fee was granted *in praesenti*. Even if so, it was manifestly a grant to the tribe as a quasi corporation. The individual gained no title or right to title.[1] He was not a tenant in common. He had nothing to transmit by inheritance. He was simply one of a membership constantly changing and shifting through birth and death, resignation and adoption, each of whose constituents, while he lived and remained a member, had doubtless a usufructuary right, a voice in the administration of the tribal estate, and an expectancy that when the estate came to be distributed (if it ever did) he would receive his just share with the other members existing at that time.

*Sizemore* v. *Brady*, 235 U. S., 441, 449.
*McKee* v. *Henry*, 201 Fed., 74, 76.
*Ligon* v. *Johnston*, 164 Fed., 670.
*Woodbury* v. *United States*, 170 Fed., 302.

[1] The treaty of April 18, 1867, Article VII, provided: "As soon as the location of the reservation set apart by the second article hereof shall have been approximately ascertained and reported to the office of Indian Affairs the Secretary of the Interior shall cause the same to be surveyed in conformity to the system of government surveys, and whenever, after such survey, any Indian of the bands parties hereto, either male or female, shall have ten acres of land under cultivation, such Indian shall be entitled to receive a certificate showing him to be entitled to the forty acres of land, according to legal subdivision, containing the said ten acres or the greater part thereof, and whenever such Indian shall have an additional ten acres under cultivation, he or she shall be entitled to a certificate for additional forty acres, and so on, until the full amount of one hundred and sixty acres may have been certified to any one Indian; and the land so held by any Indian shall be exempt from taxation and sale for debt, and shall not be alienated except with the approval of the Secretary of the Interior, and in no case to any person not a member of the Chippewa tribe."

It is not to be pretended that this provision has any application to the present case.

2. *The Nelson Act intends that allotments shall be made to living members only.*

Section 3 of the Nelson Act provides that as soon as the census has been taken and the cession made and approved, the Indians shall be placed upon the two reservations, and—

> Thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven.

The act of February 8, 1887, known as the "General Allotment Act" (24 Stat., 388, sec. 1), and the amendatory act of February 28, 1891 (26 Stat., 794, sec. 1), permit allotments to be made to Indians "located" on the reservations. Section 2 of the general allotment act declares that the allotments "shall be *selected* by the Indians, * * * and in such manner as to embrace the improvements of the Indian making the selection"; and that if anyone entitled to an allotment shall fail to make a selection the Secretary of the Interior may cause his selection to be made for him by an agent.

The right to receive allotments is thus clearly limited to persons *in esse,* who can select their own allotments.

The opinion rendered by Mr. Assistant Attorney General Van Devanter in the case of *William Dole*

(30 L. D., 532) is precisely in point. By an agreement ratified by the act of February 13, 1891 (26 Stat., 753), the Iowa Indians, for valuable considerations, surrendered to the United States the most of their reservation, stipulating, however, that each member should be entitled to "select and locate" an allotment. The language used was quite similar to that of the General Allotment Act, both in respect of the method of allotment and the form of the trust and final patents. William Dole was alive when the agreement was made, and signed it. He continued to live until it was ratified, but died before a selection had been made by him or on his behalf. A selection was subsequently made in his name, and this was followed by an allotment and trust patent, as in the case at bar. His heirs, like the appellant here, sought to sustain the allotment upon the ground that the agreement was a compact for the peculiar benefit of those members who were living at the time and took part in it. This contention was denied in the opinion cited, which, after reviewing a number of other cognate rulings, proceeds as follows (p. 535):

> The language of the agreement with the Iowa tribe of Indians is that the members thereof "shall be entitled to select and locate" upon a specified quantity of land. The right of each and every member of said tribe to an allotment was therefore not fixed by the ratification of said agreement, but only their right to make selection was thus

fixed, and the approval of the allotment is contingent upon such selection. The "selection" contemplated by the agreement is evidently one made within a specified time after notice under the supervision of a regularly designated special agent. While authority is given such agent to make selection for an absentee entitled thereto—"which shall have the same effect as if made by the person so entitled"—there is no provision for his making a selection on behalf of a deceased person. The terms of the agreement, which follows the language of the general allotment act, contemplate a personal selection on the part of a person entitled thereto, or a selection in behalf of one in being or alive at the time. In the case under consideration Willie Dole did not make a selection before he died, as required by the law; in fact, never made any selection at all. Hence, under the rule already laid down by the department as above, the allotment in his name was improperly allowed, nor could it be confirmed to his heirs, he having failed to make a selection prior to his death, or anyone for him prior thereto.

I am therefore of opinion, and so advise you, that, under the ruling in the case of Lizzie Bergen, *supra*, the patent issued in the name of Willie Dole should be canceled.

To the same effect see the case of *Dallas Shaw* (40 L. D., 9) concerning a Sioux allotment.

The Steenerson Act, approved April 28, 1904 (33 Stat., 1786, ch. 539), supplementing the Nelson

Act (see *Fairbanks* v. *United States*, 223 U. S., 215), authorized an allotment "to each Chippewa Indian now legally residing upon the White Earth Reservation" who had not received 160 acres. The Secretary of the Interior instructed the Indian agent that, in making such allotments "the usual rule and practice of this office must be observed, namely, the Indian must be in being at the time the allotment is made or assigned to him; in other words, no allotment can be made to a dead Indian." In *Woodbury* v. *United States* (170 Fed., 302), decided by Circuit Judges Sanborn and Van Devanter and District Judge Amidon, it was held that an Indian who, while living, possessed the qualifications entitling him to an allotment under this act, who prematurely filed his written selection of an allotment, but who died before such selection could properly be received, acquired no right in the land selected which could pass to his heirs or legal representatives, and that a second selection which was made after his death was properly disallowed by the department. In the course of its opinion the court said, page 305:

> Counsel for complainant further contends that as Woodbury at the time of his death was a member of the tribe and possessed of all the qualifications entitling him to an additional allotment, and as the only reason why his right had not ripened into an actual allotment was the preliminary administrative work necessary to carry out the project, this,

being no fault of his, ought not to impair his right. The difficulty with this argument is that the delay was nobody's fault. It must have been contemplated by Congress. Until the allotment was made Woodbury's right was personal—a mere float—giving him no right to any specific property. This right, from its nature, would not descend to his heirs. They, as members of the tribe, were severally entitled to their allotments in their own right. To grant them the right of their ancestor, in addition to their personal right, would give them an unfair share of the tribal lands. The motive underlying such statutes forbids such a construction. As the learned United States attorney says in his able brief:

"It is well to remember that these Indian laws were not enacted merely to create property rights for the enrichment of Indian families. They were designed to operate on the individual Indian in his lifetime, to the end that they might mold and shape his life and habits somewhat after the manner and ways of civilization."

In *Fairbanks* v. *United States* (223 U. S., 215, 225) this court had occasion to pass upon the question whether Indians born years after the Nelson Act went into effect were entitled to take allotments thereunder. Interpreting the term "located," in the first section of the General Allotment Act, as amended by the act of 1891, *supra,* the court said:

Of itself it has no reference to time. It has reference entirely to place and is used

> to designate upon what Indians the powers given by the act, *when exercised* [italics ours], should operate—that is, " to each Indian located " on the reservation. The act was a part of a scheme of legislation to have existence and continuity of action until its purpose should be completely fulfilled. See *Oakes* v. *United States* (172 Fed. Rep., 305).

In principle the *Fairbanks case* determines this one. Location on the reservation when the allotting power is exercised is the test of the right to receive an allotment. This necessarily excludes all persons who died before the power came into play. Appellant's contention, that the beneficiaries were to be those Indians who were *in esse* when the agreement was consummated and that only so much land as might be needed to satisfy their claims was to be reserved from the cession, is thus disposed of effectually.

The *Fairbanks* decision clearly accepts the policy of the General Allotment Act as the policy of the Nelson Act. There can be no doubt whatever that the former looks forward for its beneficiaries—allotments are to be made to living Indians who can apply for them and use them; it takes no account of the dead, and does not seek, upon any theory of fixing and crystalizing rights as of any particular date, to swell the estates of some, through inheritance, at the expense of others who have received nothing.

The Nelson Act itself and the report of the negotiations with the Indians, which the appellant cites, bear no evidence of any occasion for an immediate partition of the tribal property. The act was not passed to settle disputes among the Indians. It was for their "relief and civilization." They were in dire need. Little, if any, progress had been made under the limited provisions for allotments contained in the treaty of 1867. The vast area of their reservations had not served to develop the Indians individually, or relieve them from want. Its money value was great; but the land could not be sold, and the pine timber was continually threatened with destruction. In these circumstances Congress passed and the Indians accepted the Nelson Act, to relieve them and civilize them, by giving them individual allotments and by converting their surplus land into a trust fund, the interest from which should be applied each year for their education and personal needs, and the principal of which should be divided, at the end of the trust period of 50 years, among all the Indians then living. In all this there is nothing to justify the assumption that the particular Indians who chanced to be living when the plan was arranged were to receive any greater or more definite benefits than those who might come after them while the plan was in process of execution. The provisions concerning the use and disposition of the trust moneys (sec. 7) expressly contradict that no-

tion. As for the allotments, even if all doubt were not precluded by the language and construction of the General Allotment Act, we need hardly observe that the normal and consistent thing (where the object was not to partition the tribal estate, but to "relieve and civilize" the Indians) would be to furnish the allotments to those who were able to hold and profit by them.

In the case of the Five Civilized Tribes the dominant objects were to protect the rights of all the members against the selfish aggressions of a few, partition the tribal lands, break up the tribal governments, and prepare the way for a new state. (See *Woodward* v. *Graffenried,* 238 U. S., 284). The acts and agreements relating to the reservations of those tribes accordingly confer the right to allotments on the persons living at stated times, and provide in so many words that, in case of death before allotment, the allotment shall go to the heirs.

> Evidently anticipating that participation in the allotment and distribution might in some instances be cut off by death, Congress made provision for such a contingency.
>
> *Skelton* v. *Dill,* 235 U. S., 206, 208.

If Congress had intended to provide a similar scheme of distribution for the Chippewas, it would have said so expressly in the Nelson Act.

In concluding this topic we submit that no appreciable reason has been suggested for overturning the uniform and clearly established practice of

the Interior Department and for letting in claims, like the appellant's, which have not been recognized, to the possible prejudice of other claims which have.

## II.

**The statute of limitations of March 3, 1891 (26 Stat., 1095, sec. 8), has no application to a trust patent issued upon an Indian allotment.**

It is elementary that, like a deed to a fictitious person (*Moffat* v. *United States,* 112 U. S., 24, 31), a deed to a grantee not *in esse* at the time, even though the habendum be to him and his " heirs," is an absolute nullity.

1 *Devlin on Deeds,* 3d ed., sec. 187.
3 *Washburn, Real Pr.,* 6th ed., 2121.
2 *Minor, Real Pr.,* sec. 1088.
*Hunter* v. *Watson,* 73 Am. Dec., 543.
*Baker* v. *Lane,* 82 Kan., 715.

The word " heirs " is taken as describing the estate and not its destination.

We do not see fit to urge this rule in the present case, because we are by no means persuaded that a trust patent, in the form prescribed by the General Allotment Act, should not be treated as a declaration of trust in favor not only of the allottee named but also of those persons who may become his heirs when he dies; and it is possible that, with the help of the state law, an even broader interpretation in their favor might be read into such instruments when lawfully issued.

There are, however, two good reasons why the limitation act of March 3, 1891, should be held inapplicable:

1. *The act applies only to land subject to acquisition under the public land laws and can not affect a suit like this, brought by the Government on behalf of its Indian wards, respecting land which, until lawfully allotted, belongs to the tribe.*

In *Northern Pacific Railway Co.* v. *United States* (227 U. S., 355), this court held that neither the act of 1891, *supra,* nor the act of March 2, 1896 (29 Stat., 42), applies to a suit brought to set aside patents erroneously issued under a railroad grant for lands within an Indian reservation. Speaking of the latter act, it said (p. 367):

> The act was one of a series of acts and manifestly applies only to the public lands of the United States subject to acquisition under the laws enacted for the disposition of the public domain.

The act of 1891 was held inapplicable for the same reasons (ib.).

The land here involved is distinctly Indian land, and the only object of the suit is to clear up the title so that the land may be allotted according to law.

2. *The "patents" intended by the act of 1891 are patents conveying the legal title, such as are issued under the general land laws; the term has no proper application to such an instrument as the one here in question.*

Respecting the nature of the instruments intended by the act of 1891, we refer again to the case of *Northern Pacific Railway Co.* v. *United States, supra;* also *United States* v. *Stone* (2 Wall., 525, 535) and *The Maxwell Land Grant case* (121 U. S., 325, 380). Respecting the nature of allotment trust "patents," see *United States* v. *Rickert* (188 U. S., 432, 436), and the opinion of Assistant Attorney General Van Devanter in the case of *Lizzie Bergen* (30 L. D., 258). As was pointed out in the two opinions last cited, it was a misnomer to call the instruments issued under the allotment act "patents." They are, as the court said in the *Rickert* case, "nothing more than instruments or memoranda in writing" designed to show that the United States would hold land in trust for 25 years, or longer, and then convey the fee. We agree with the suggestion made in the *Lizzie Bergen* case, that they are quite analogous to the certificates issued to entrymen under the public land laws, and, we may add, to the allotment certificates issued to members of the Five Civilized Tribes. They are essentially different from patents to Indians in fee, subject to restrictions on alienation, though opposing counsel has not observed the distinction in writing his brief.

Until it was taken away by the act of April 23, 1904, discussed below, the power to inquire into the validity of allotment trust patents, and to set them aside for fraud or error, was vested in the Interior De-

partment in the same way as the power to inquire into and set aside final entry certificates issued under the general land laws. *Lizzie Bergen case, supra.* Hence there was no occasion to apply to the courts for relief in such cases and it is doubtful whether they had jurisdiction to grant it. All questions concerning the title were examinable before the department until the final instrument—the true patent, conveying the legal title—had been issued.

Therefore, despite the use of the term "patent," and despite the possibility that these tentative instruments, because of the manner of their execution, may conform with some loose conception of the term unknown to the public land law, it is quite inconceivable that Congress, when dealing with the public lands through the act of 1891, could have intended by section 8 to include both classes of instruments without discrimination.

The object of the limitation was to insure the stability of fee titles depending on solemn patents issued under the general land laws.

In this connection appellant places some reliance on the so-called Clapp amendment of June 21, 1906, the theory being that by converting the trust patent into a fee patent it rendered the act of limitation applicable. The amendment reads:

> That all restrictions as to sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of

> Minnesota, *now* or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application.
>
> 34 Stat., 325, 353.

This was amended in 1907 by changing the word "now," above italicized, to "heretofore." Id., 1034.

Clearly, as the amendment is not retrospective, the patent here involved could not be deemed to have acquired its new quality until June 21, 1906, which was less than three years before the filing of the bill (R., 1).

And, again, the act operates only upon allotments "held" by adult mixed-blood Indians. This allotment was never in that category, if "held" means lawfully held, as we submit it must. The amendment was not intended to ratify or confirm void allotments.

## III.

**The provision in the act of April 23, 1904 (33 Stat., 297), declaring that conditional patents issued upon Indian allotments may not be canceled without authority of Congress except in certain cases therein specially provided for, is but a limitation upon the power of the Secretary and was not intended to deprive the courts of authority inherently vested in them.**

The act of January 26, 1895 (28 Stat., 641), provided:

> That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian and for which a conditional patent may have been issued, to rectify and correct such mistakes, and cancel any patent which may have been thus erroneously and wrongfully issued, whenever in his opinion the same ought to be canceled for error in the issue thereof, or for the best interests of the Indian, and, if possession of the original patent can not be obtained, such cancellation shall be effective if made upon the records of the General Land Office; and no proclamation shall be neces-

sary to open the lands so allotted to settlement.

In the case of *Lizzie Bergen, supra,* the origin of this enactment was clearly explained, and, for reasons there stated, the conclusion was reached that it was merely declaratory in part of a power which already existed, which was broader than the declaration, and was not intended to be limited thereby.

The act of April 23, 1904 (33 Stat., 297), amended the act of 1895 to read as follows:

> That in all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian, and for which a conditional patent may have been issued, to rectify and correct such mistakes and cancel any patent which may have been thus erroneously and wrongfully issued whenever in his opinion the same ought to be canceled for error in the issue thereof, and if possession of the original patent can not be obtained, such cancellation shall be effective if made upon the records of the General Land Office; and no proclamation shall be necessary to open to settlement the

> lands to which such an erroneous allotment patent has been canceled, provided such lands would otherwise be subject to entry: *And provided,* That such lands shall not be open to settlement for sixty days after such cancellation: *And further provided,* That no conditional patent that shall have heretofore or that may hereafter be executed in favor of any Indian allottee, excepting in cases hereinbefore authorized, and excepting in cases where the conditional patent is relinquished by the patentee or his heirs to take another allotment, shall be subject to cancellation without authority of Congress.

The title of the act is:

> An act amending the act of Congress approved January twenty-sixth, eighteen hundred and ninety-five, entitled "An act authorizing the Secretary of the Interior to correct errors where double allotments of land have erroneously been made to an Indian, to correct errors in patents, and for other purposes."

Obviously, the purpose was to specify the cases in which the Secretary might act, and limit his power to them. The courts are not referred to, in the title or elsewhere. If appellant's position were sound, we should have this anomalous and wholly uncalled for result: The Secretary would be empowered to cancel these certificates in the cases specified and those only, and without limitation as to time, but the courts would be ousted entirely of

their normal jurisdiction, even in cases of flagrant fraud.

In *United States* v. *Chehalis County* (217 Fed., 281, 284) it was decided that the jurisdiction of the courts is not affected by this act of 1904.

## CONCLUSION.

It is respectfully submitted that the decree of the court below should be affirmed.

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S. W. WILLIAMS,
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OCTOBER, 1915.

O

# LA ROQUE *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 240. Argued October 15, 18, 1915.—Decided November 8, 1915.

The Nelson Act of January 14, 1889, c. 24, 25 Stat. 642, for allotment to Chippewas of the White Earth Indian Reservation contemplated only selections on the part of living Indians acting for themselves or through designated representatives. There was no displacement of the usual rule that incidents of tribal membership, like the membership itself, are terminated by death.

While not conclusive, the construction given to an act of Congress relative to Indian allotments, in the course of its actual execution by the Secretary of the Interior, is entitled to great respect and ought not to be overruled without cogent and persuasive reasons.

The fact that the act provided for a census of the Indians is not conclusive that the allotments were to be made to all those included in the census. *Fairbanks* v. *United States*, 223 U. S. 215.

The act of March 3, 1891, c. 561, 26 Stat. 1099, establishing a six year limitation for actions by the United States to annul patents, has been construed as being part of the public land laws and refers to patents issued for public lands and does not relate to suits to annul trust patents for allotments of reserved Indian lands.

The act of April 23, 1904, c. 1489, 33 Stat. 297, limiting and defining the authority of the Secretary of the Interior to correct mistakes in, and to cancel, trust patents for Indian allotments does not restrict or define the powers or jurisdiction of the court to cancel such a patent.

198 Fed. Rep. 645, affirmed.

THE facts, which involve the construction of the Nelson Act of 1889 and an allotment to a Chippewa Indian in the White Earth Indian Reservation in Minnesota, are stated in the opinion.

*Mr. J. T. Van Metre* for appellant.

*Mr. Assistant Attorney General Knaebel*, with whom *Mr. S. W. Williams* was on the brief, for the United States.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to cancel a so-called trust patent for an allotment in the White Earth Indian Reservation in Minnesota on the ground that the allotment was made inadvertently and in contravention of the act of January 14, 1889, c. 24, 25 Stat. 642, known as the Nelson Act. In the Circuit Court there was a decree dismissing the bill

upon the merits and this was reversed by the Circuit Court of Appeals with instructions to enter a decree according to the prayer of the bill subject to a qualification not here material. 198 Fed. Rep. 645.

The facts are not in dispute and are these: Vincent La Roque, in whose name the trust patent issued, was a Chippewa Indian born in 1883 of parents residing on the White Earth Reservation and was among those whose names were included in the census of Minnesota Chippewas made under the Nelson Act. Had he lived he would have been entitled to take an allotment under that act. He died shortly after 1889 without an allotment being selected by or for him. Thereafter an application in his name for the allotment in question was presented to the allotting officers, and upon this application the allotment was made and the trust patent was issued, both in his name, as if the selection were made while he was living. Henry La Roque, the defendant, is his father and as sole heir claims the land under the allotment and trust patent.

Whether the Nelson Act contemplated that allotments should be made on behalf of Indians otherwise entitled thereto but who should die without selecting or receiving them is the principal question for decision. The regulations and decisions of the Secretary of the Interior, under whose supervision the act was to be administered, show that it was construed by that officer as confining the right of selection to living Indians and that he so instructed the allotting officers. While not conclusive, this construction given to the act in the course of its actual execution is entitled to great respect and ought not to be overruled without cogent and persuasive reasons. *United States* v. *Moore*, 95 U. S. 760, 763; *Hastings & Dakota R. R.* v. *Whitney*, 132 U. S. 357, 366; *United States* v. *Hammers*, 221 U. S. 220, 225, 228; *Logan* v. *Davis*, 233 U. S. 613, 627. Not only so, but it receives additional force from its adoption by the Circuit Court of Appeals for the Eighth Circuit

in *Woodbury* v. *United States*, 170 Fed. Rep. 302, where it was said by District Judge Amidon in speaking for that court: "Until the allotment was made, Woodbury's right was personal—a mere float—giving him no right to any specific property. This right, from its nature, would not descend to his heirs. They, as members of the tribe, were severally entitled to their allotments in their own right. To grant them the right of their ancestor, in addition to their personal right, would give them an unfair share of the tribal lands. The motive underlying such statutes forbids such a construction."

The Nelson Act embodied a plan for securing a cession by the several bands of Chippewa Indians in Minnesota of all reservations occupied by them except portions of the White Earth and Red Lake reservations required to make allotments, for removing to the White Earth Reservation all the bands save those on the Red Lake Reservation, for making allotments in severalty in the unceded lands, and for disposing of the ceded lands, placing the net proceeds at interest and distributing them in severalty at the end of fifty years. Section 1 required that a census be made of each tribe or band for the purpose of ascertaining whether the proper number of Indians assented to the cession and "of making the allotments and payments" contemplated; and section 3 directed that, following the census, the cession and the removal to the White Earth Reservation, allotments in severalty be made, as soon as practicable, to the Red Lake Chippewas in the Red Lake Reservation, and to the others in the White Earth Reservation, "in conformity with" the general allotment act of February 8, 1887, c. 119, 24 Stat. 388, subject to a proviso that any Indian living on any of the ceded reservations might, in his discretion, take his allotment therein instead of moving to the White Earth Reservation.

The general allotment act of 1887, in conformity with which the Chippewa allotments were to be made, after

authorizing a survey of the reservation to be allotted, provided for an allotment in severalty of a designated area "to any Indian located thereon," and then directed that all allotments "be selected by the Indians, heads of families selecting for their minor children" and the agents selecting for orphan children, and that "if any one entitled to an allotment shall fail to make a selection within four years . . ., the Secretary of the Interior may direct a selection for such Indian" to be made by an agent.

We think the terms of the general act contemplated only selections on the part of living Indians acting for themselves or through designated representatives. The express provision for selections in behalf of children and of Indians failing to select for themselves and the absence of any provision in respect of Indians dying without selections are persuasive that no selections in the right of the latter were to be made. In other words, as to them there was no displacement of the usual rule that the incidents of tribal membership, like the membership itself, are terminated by death. See *Gritts* v. *Fisher*, 224 U. S. 640, 642; *Oakes* v. *United States*, 172 Fed. Rep. 305, 307. It is upon this view that the execution of the general act and other similar acts has proceeded. 30 Land Dec. 532; 40 *Id.* 9; 42 *Id.* 446, 582; *Woodbury* v. *United States*, 170 Fed. Rep. 302.

As calling for a different construction of the Nelson Act the defendant relies upon the provision for a census of the Indians and upon the report of the negotiations with them resulting in the cession contemplated by the act, the contentions advanced being that the provision for a census makes it clear that the census when completed was to be accepted as finally determining who were to receive allotments, and that the report of the negotiations shows that the Indians gave their assent to the cession in the belief that the right to select and receive an allotment would not

be terminated by death but would pass to the heirs of the deceased. We are unable to assent to either contention. While the act directed that a census be made "for the purpose," among others, "of making the allotments" contemplated, we think this meant nothing more than that the census should serve as a preliminary guide in ascertaining to whom allotments should be made. There was no direction that it be treated as controlling—or that allotments be made to all whose names appeared therein or only to them. The work of allotment could not be undertaken at once. The cession was not to be effective until approved by the President. Many of the Indians were to be removed from the ceded reservations to the White Earth Reservation, and much other work was required to prepare the way. So, it must have been contemplated that many changes would occur in the membership of the several bands through deaths and births before the allotments could be made. In *Fairbanks* v. *United States*, 223 U. S. 215, we held that children born into the bands after the census were entitled to allotments, although not listed in it, and we perceive no reason for giving the census any greater effect in this case than was given to it in that. No doubt it is to be accepted as an authorized listing of the members of the several bands who were living when it was made, but it has no other bearing in cases like the present. The contention that the Indians understood that the right to select and receive an allotment would not be terminated by death but would pass to the heirs of the deceased is based upon excerpts from addresses made to the Indians by the Commissioners representing the Government in the negotiations. Even when read apart from the context these excerpts afford little basis for the contention and when read with the context they make against the contention rather than for it. The real effect of what was said was that on the death of any Indian "after receiving an allotment" the land would pass

to his heirs, which is quite consistent with our construction of the act.

The suit was brought between six and seven years after the date of the trust patent, and because of this it is urged that the suit was barred by § 8 of the act of March 3, 1891, c. 561, 26 Stat. 1099 (see also c. 559, p. 1093), which provides that "suits by the United States . . . to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." This contention must be overruled upon the authority of *Northern Pacific Ry.* v. *United States*, 227 U. S. 355, 367, where it was held that this section is part of the public land laws and refers to patents issued for public lands of the United States. This trust patent was not issued for public lands of the United States but for reserved Indian lands to which the public land laws had no application. And it may be well to observe in passing that the Circuit Court of Appeals directed that there be embodied in the decree a provision that the Government holds the lands in the same way it held them before the patent was issued, that is, as reserved Indian lands.

Another objection to the suit is predicated upon the act of April 23, 1904, c. 1489, 33 Stat. 297, limiting and defining the authority of the Secretary of the Interior to correct mistakes in and to cancel trust patents for Indian allotments, but of this it is enough to say that we concur in the view of the Circuit Court of Appeals that this section, which makes no reference to the courts, discloses no purpose to restrict or define their jurisdiction or powers in suits such as this.

*Decree affirmed.*

MR. JUSTICE MCREYNOLDS took no part in the consideration or decision of this case.